ONTARIO
LABOUR RELATIONS BOARD
REPORTS

January/February 2007

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A Bimonthly Series of Decisions from the
Ontario Labour Relations Board

Cited [2007] OLRB REP. JANUARY/FEBRUARY

EDITORS: VOY STELMASZYNSKI
LEONARD MARVY

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

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BURLING RANGER COMPANY INC.: RE LIUNA LOCAL 505 8

Abandonment – Bargaining Rights – Certification – Construction Industry – Delay – In 1998, Local 183 filed an application for certification for all the construction labourers of the respondent, Beamish – A vote took place and 23 of the 36 votes were challenged but the application was never disposed of – In November 2006 Local 183 brought an application for certification for the same bargaining unit – Beamish took the position that the 1998 application was still outstanding and that the 2006 application indicated Local 183's intention to withdraw the 1998 application – Beamish further argued that the Board should treat the 1998 application as having been withdrawn by Local 183, with a bar subject to subsection 7(10) of the Act – Local 183 offered no explanation for the delay or for why the 1998 application was never concluded – Absent any explanation for the delay, the Board dismissed the 1998 application as being abandoned as of the date of the present decision – The Board declined to characterize the 2006 application as a request to withdraw the 1998 application and thus determined that mandatory bars imposed pursuant to subsections 7(10) and 10(3) were not applicable – The Board did exercise its discretion pursuant to subsection 111(2)(k) and barred Local 183 for six months from the date of this decision from making an application for certification to represent the members of the bargaining unit of Beamish – Both applications (1998 and 2006) dismissed

K.J. BEAMISH CONSTRUCTION SERVICES LTD.: RE LIUNA LOCAL 183 116

Abuse of Process – Employment Standards – Practice and Procedure – In this employee application for review, the Board had issued earlier decisions describing the applicant's inappropriate, disrespectful and disruptive behaviour – Ultimately the Board was forced to cut short a hearing day because of the employee's conduct, and seek submissions from the parties as to how to proceed – The employer argued that to continue would be an abuse of process, the applicant had not pleaded a *prima facie* case or, alternatively, the applicant should provide a medical assessment of his ability to proceed – The applicant sought the Vice-Chair's recusal, an order from the Board admonishing employer counsel's behaviour, and a broader investigation into his employment and discharge (including reprisal) – The Board refused to step down, confirmed that employer counsel's conduct had been courteous and restrained, and held that the breadth of the issues before it already encompassed the remedies the applicant was seeking – The Board terminated the hearing and dismissed the application because of the applicant's conduct

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THE CORPORATION OF THE CITY OF CORNWALL; RE CUPE LOCAL 3251 PARA.. 198

Bar – Certification – Construction Industry – The Union filed an earlier application for certification in 2003 in which the Employer had given notice under section 8.1 – The application was "forgotten" after the representation vote and remained unresolved – In 2006, the Union filed a fresh application with respect to the same bargaining unit – Neither party made any reference to the 2003 application in their filings with the Board – After the Board brought the 2003 application to the parties' attention, the Union conceded the section 8.1 objection and requested that the 2003 application be dismissed without imposing a bar to future applications in accordance with subsection 10(4) – The Employer argued that because this was a construction industry application and there was a conflict between sections 160 and 10, section 160 took precedence and the mandatory bar in subsection 160(3) applied – The Board held that there was no conflict and subsection 10(4) applied to preclude the application of the mandatory bar – The Board declined to impose a discretionary bar having regard to the substantial prejudice to the employees' right to seek union representation – The Board found it unnecessary to impose a discretionary bar so as to deter similar circumstances in the future in the future – The 2006 application was allowed to proceed

AMACON CONSTRUCTION LTD. AND/OR AMACON DEVELOPMENT GROUP INC.; RE LIUNA LOCAL 183.. 1

Bargaining Rights – Abandonment – Construction Industry Grievance – Delay – Labourers 506 grieved that Burling Ranger had violated the provincial ICI agreement by failing to employ members of 506 or failing or refusing to subcontract work to subcontractors in contractual relations with the union – The Labourers relied on a collective agreement signed in 1970 by the applicant and Burling – The responding party argued that the union had abandoned its rights by failing to assert them as long ago as prior to the inception of provincial bargaining – The union served Burling with notice to bargain in the early 1970's, but the employer responded that it had no work in the geographic area – The Board heard evidence relating to subsequent work performed by Burling over an almost thirty-year period, without any assertions by the Labourers to rights under the collective agreement - Grievance dismissed

BURLING RANGER COMPANY INC.; RE LIUNA LOCAL 506................................ 8

Bargaining Rights – Abandonment – Certification – Construction Industry – Delay – In 1998, Local 183 filed an application for certification for all the construction labourers of the respondent, Beamish – A vote took place and 23 of the 36 votes were challenged but the application was never disposed of – In November 2006 Local 183 brought an application for certification for the same bargaining unit – Beamish took the position that the 1998 application was still outstanding and that the 2006 application indicated Local 183's intention to withdraw the 1998 application – Beamish further argued that the Board should treat the 1998 application as having been withdrawn by Local 183, with a bar subject to subsection 7(10) of the Act – Local 183 offered no explanation for the delay or for why the 1998 application was never concluded – Absent any explanation for the delay, the Board dismissed the 1998 application as being abandoned as of the date of the present decision – The Board declined to characterize the 2006 application as a request to withdraw the 1998 application and thus determined that mandatory bars imposed pursuant to subsections 7(10) and 10(3) were not applicable – The Board did exercise its discretion pursuant to subsection 111(2)(k) and barred Local 183 for six months from the date of this decision from making an application for certification to represent the members of the bargaining unit of Beamish – Both applications (1998 and 2006) dismissed

K.J. BEAMISH CONSTRUCTION SERVICES LTD. RE LIUNA LOCAL 183........... 116

Bargaining Rights – Bargaining Unit – Certification – Collective Agreement – Construction Industry – In these six applications for certification, the issues were: (i) whether the Employers were bound by the EPSCA Agreement on the application date; (ii) whether the applications ought to be dismissed for a lack of labour relations purpose and (iii) the appropriate bargaining unit – The Employers were not members of EPSCA – When bidding for work tendered by Ontario Power Generation (OPG), the Employers must accept a "Labour Requirements Clause" (LRC) which obliged the Employers to abide by the EPSCA Agreement – The Board held that the Employers were not bound by the EPSCA Agreement because (a) the Employers had neither entered into voluntary recognition agreements with the Unions nor authorized EPSCA or OPG to be their agent by virtue of the LRC; (b) the LRC did not establish a direct connection between the Employers and the Unions party to the EPSCA Agreement; (c) contacting the Unions' hiring halls for employees did not constitute a voluntary recognition agreement, and (d) section 57 of the *Act* had no application as the Employers were not members of EPSCA – The Board refused the Employers' request to dismiss the applications for certifications as the Board found the *Act* did not confer on it the discretion to dismiss or refuse to entertain timely applications for certification, even if the applications are devoid of labour relations purpose – The Unions' request for a province-wide bargaining unit was rejected; rather, the appropriate bargaining unit was the Unions' trade or craft in all sectors of the construction industry other than the ICI sector in the Board Areas in which employees were working on the application date – Certificates issued in two; the others referred to Manager of Field Services

CANFORM STRUCTURES LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION.......... 28

Bargaining Unit – Bargaining Rights – Certification – Collective Agreement – Construction Industry – In these six applications for certification, the issues were: (i) whether the Employers were bound by the EPSCA Agreement on the application date; (ii) whether the applications ought to be dismissed for a lack of labour relations purpose and (iii) the appropriate bargaining unit – The Employers were not members of EPSCA – When bidding for work tendered by Ontario Power Generation (OPG), the Employers must accept a "Labour Requirements Clause" (LRC) which obliged the Employers to abide by the EPSCA Agreement – The Board held that the Employers were not bound by the EPSCA Agreement because (a) the Employers had neither entered into voluntary recognition agreements with the Unions nor authorized EPSCA or OPG to be their agent by virtue of the LRC; (b) the LRC did not establish a direct connection between the Employers and the Unions party to the EPSCA Agreement; (c) contacting the Unions' hiring halls for employees did not constitute a voluntary recognition agreement, and (d) section 57 of the *Act* had no application as the Employers were not members of EPSCA – The Board refused the Employers' request to dismiss the applications for certifications as the Board found the *Act* did not confer on it the discretion to dismiss or refuse to entertain timely applications for certification, even if the applications are devoid of labour relations purpose – The Unions' request for a province-wide bargaining unit was rejected; rather, the appropriate bargaining unit was the Unions' trade or craft in all sectors of the construction industry other than the ICI sector in the Board Areas in which employees were working on the application date – Certificates issued in two; the others referred to Manager of Field Services

CANFORM STRUCTURES LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION.......... 28

Bargaining Unit – Certification – Construction Industry – Sector Determination – The parties to these various applications for certification sought a determination from the Board for a number of issues relating to bargaining units – In an earlier decision (May 24, 2006), the Board confirmed that the appropriate bargaining unit is the bargaining unit described in the EPSCA collective agreement which bound the parties at the time the applications were filed – The Board assisted the parties in clarifying the work covered in the bargaining unit description – The Board confirmed that the bargaining unit described in the August 22, 2005 decision was limited to the electrical power systems sector, and held that the certificates should make specific reference to that sector – Finally, the Board made determinations respecting the correct names of the responding parties – Separate certificates to issue at a later date

ONTARIO POWER GENERATION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCILS; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE LIUNA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE POWER WORKERS UNION CANADIAN UNION OF PUBLIC EMPLOYEES, C.L.C. LOCAL 1000.. 146

Bargaining Unit – Certification – Construction Industry – The union sought to expand its existing bargaining units by displacing itself and applying for certification for broader bargaining units – The broader units included employees who were already subject to collective agreements between the applicant and the responding parties but were not at work on the application date, plus all sectors of the construction industry in the Board Areas where the electricians employed by the responding parties were working on the application date – The applicant asserted that a displacement application was the only way for it to expand its bargaining unit which was necessary to ensure that its members would not be deprived of work by the responding parties' use of subcontractors bound by collective agreements with other trade unions – The Board held that the applicant was in the same position as any trade union seeking to displace another; thus the established policy that the appropriate bargaining unit in a displacement application is the unit held by the incumbent union applied unless there were clear and compelling reasons to hold otherwise – In this case there were no clear and compelling reasons as to why this long standing policy ought to be disregarded – The Board held that the appropriate bargaining unit was the one found in the applicant's collective agreement with each responding party – Matter continues

ONTARIO POWER GENERATION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE LIUNA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE POWER WORKERS UNION CANADIAN UNION OF PUBLIC EMPLOYEES, C.L.C. LOCAL 1000.. 137

Certification – Membership Evidence – Practice and Procedure – Reconsideration – In the context of a reconsideration of a certification application where the employer provided the Board with affidavit evidence from employees who swore they had not signed membership cards, the Board allowed the trade union to have the employees' signatures subjected to forensic analysis – As the request for reconsideration was proceeding to hearing, the union sought the Board's permission to disclose to the employer the identity of the person whose signature was challenged – Disclosure granted – Matter continues

LES BURCH & SON CONTRACTING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.. 125

Certification – Abandonment – Bargaining Rights – Construction Industry – Delay – In 1998, Local 183 filed an application for certification for all the construction labourers of the respondent, Beamish – A vote took place and 23 of the 36 votes were challenged but the application was never disposed of – In November 2006 Local 183 brought an application for certification for the same bargaining unit – Beamish took the position that the 1998 application was still outstanding and that the 2006 application indicated Local 183's intention to withdraw the 1998 application – Beamish further argued that the Board should treat the 1998 application as having been withdrawn by Local 183, with a bar subject to subsection 7(10) of the Act – Local 183 offered no explanation for the delay or for why the 1998 application was never concluded – Absent any explanation for the delay, the Board dismissed the 1998 application as being abandoned as of the date of the present decision – The Board declined to characterize the 2006 application as a request to withdraw the 1998 application and thus determined that mandatory bars imposed pursuant to subsections 7(10) and 10(3) were not applicable – The Board did exercise its discretion pursuant to subsection 111(2)(k) and barred Local 183 for six months from the date of this decision from making an application for certification to represent the members of the bargaining unit of Beamish – Both applications (1998 and 2006) dismissed

K.J. BEAMISH CONSTRUCTION SERVICES LTD.; RE LIUNA LOCAL 183.......... 116

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ONTARIO POWER GENERATION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE LIUNA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE POWER WORKERS UNION CANADIAN UNION OF PUBLIC EMPLOYEES, C.L.C. LOCAL 1000.. 137

Certification – Conflict of Interest – Security Guards – The employer objected to the certification of a bargaining unit of security guards at its client AA, asserting that a conflict of interest would arise because a local of the applicant holds bargaining rights for two other groups of AA's employees – Although the parties focused their submissions on the extent that the guards monitor AA's employees, the Board found that monitoring made up only a small part of the guards' duties – Even the guards' obligation to search individual employees' vehicles in specific circumstances did not give rise to the conflict of interest contemplated by paragraph 1 of s. 14(5) – Certificate granted

HAWTHORNE SECURITY & COMMUNICATIONS INC.; RE IAM........................ 91

Certification – Construction Industry – Evidence – Judicial Review – Natural Justice – Practice and Procedure – Reconsideration – The Carpenters moved to set aside the decision of a single judge of Divisional Court permitting the employer to rely on an affidavit in support of its judicial review application of the Board's certification decision (see [2006] OLRB Rep. Septemer/October 756) – A full panel of the Divisional Court held that the motions judge was not "clearly wrong" in concluding that one paragraph of the affidavit ought to be received by the reviewing panel in support of the employer's allegation that it was denied natural justice by the Board – The balance of the affidavit, however, should be struck because it contains material not before the Board and it is clear the Board's decision was rendered on the basis of evidence before it – The "new evidence" foundation for judicial review cannot succeed – Motion allowed in part

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND ONTARIO LABOUR RELATIONS BOARD.. 249

Certification – Construction Industry – Intervenor – A number of trade unions and employer bargaining agencies sought to intervene as *amicus curiae* in this certification application, arguing they wanted to present the Board with views regarding the undesirability of having the applicant trade union succeed and the potential destabilization in the construction industry should the applicant be found to be a trade union (its status has not yet been established) – The Board rejected the intervention of those seeking *amicus curiae* standing, relying on its own significant knowledge and experience in construction – When the Formwork Council challenged some of the voluntary recognition agreements relied on by the applicant, the applicant was invited to respond to the challenge – The Carpenters alleged the respondent employer was related to companies they were pursuing in another Board application – Application for certification joined with other Carpenter applications – Matter continues

PBS GENERAL CONTRACTORS INC.; RE CANADIAN CONSTRUCTION WORKERS' UNION; RE DRYWALL ACOUSTIC LATHING AND INSULATION, LOCAL 675; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE TABRCO MANAGEMENT LTD.; RE TARGET DRYWALL & ACOUSTICS LTD. 158

Certification – Construction Industry – Non-Construction Employer – The Labourers filed two applications for certification simultaneously (industrial and construction), seeking to represent the employees of ReNu engaged in the dismantling and removal of metal fixtures at a moribund steel manufacturing facility – The Board found that the predominant nature of the work the employees were performing was "demolition" and therefore construction – Secondly, the Board examined whether ReNu could qualify for the non-construction employer exemption – The Board found that ReNu was not performing construction work for which it could expect compensation from a third party; rather, ReNu was salvaging the metal and reselling it as part of the salvage operations – Application for construction certification dismissed – Non-Construction employer status granted – Application for industrial certification referred to Manager of Field Services to count ballots

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Collective Agreement – Bargaining Rights – Bargaining Unit – Certification – Construction Industry – In these six applications for certification, the issues were: (i) whether the Employers were bound by the EPSCA Agreement on the application date; (ii) whether the applications ought to be dismissed for a lack of labour relations purpose and (iii) the appropriate bargaining unit – The Employers were not members of EPSCA – When bidding for work tendered by Ontario Power Generation (OPG), the Employers must accept a "Labour Requirements Clause" (LRC) which obliged the Employers to abide by the EPSCA Agreement – The Board held that the Employers were not bound by the EPSCA Agreement because (a) the Employers had neither entered into voluntary recognition agreements with the Unions nor authorized EPSCA or OPG to be their agent by virtue of the LRC; (b) the LRC did not establish a direct connection between the Employers and the Unions party to the EPSCA Agreement; (c) contacting the Unions' hiring halls for employees did not constitute a voluntary recognition agreement, and (d) section 57 of the *Act* had no application as the Employers were not members of EPSCA – The Board refused the Employers' request to dismiss the applications for certifications as the Board found the *Act* did not confer on it the discretion to dismiss or refuse to entertain timely applications for certification, even if the applications are devoid of labour relations purpose – The Unions' request for a province-wide bargaining unit was rejected; rather, the appropriate bargaining unit was the Unions' trade or craft in all sectors of the construction industry other than the ICI sector in the Board Areas in which employees were working on the application date – Certificates issued in two; the others referred to Manager of Field Services

CANFORM STRUCTURES LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION.. 28

Conflict of Interest – Certification – Security Guards – The employer objected to the certification of a bargaining unit of security guards at its client AA, asserting that a conflict of interest would arise because a local of the applicant holds bargaining rights for two other groups of AA's employees – Although the parties focused their submissions on the extent that the guards monitor AA's employees, the Board found that monitoring made up only a small part of the guards' duties – Even the guards' obligation to search individual employees' vehicles in specific circumstances did not give rise to the conflict of interest contemplated by paragraph 1 of s. 14(5) – Certificate granted

HAWTHORNE SECURITY & COMMUNICATIONS INC.; RE IAM........................ 91

Construction Industry – Abandonment – Bargaining Rights – Certification – Delay – In 1998, Local 183 filed an application for certification for all the construction labourers of the respondent, Beamish – A vote took place and 23 of the 36 votes were challenged but the application was never disposed of – In November 2006 Local 183 brought an application for certification for the same bargaining unit – Beamish took the position that the 1998 application was still outstanding and that the 2006 application indicated Local 183's intention to withdraw the 1998 application – Beamish further argued that the Board should treat the 1998 application as having been withdrawn by Local 183, with a bar subject to subsection 7(10) of the Act – Local 183 offered no explanation for the delay or for why the 1998 application was never concluded – Absent any explanation for the delay, the Board dismissed the 1998 application as being abandoned as of the date of the present decision – The Board declined to characterize the 2006 application as a request to withdraw the 1998 application and thus determined that mandatory bars imposed pursuant to subsections 7(10) and 10(3) were not applicable – The Board did exercise its discretion pursuant to subsection 111(2)(k) and barred Local 183 for six months from the date of this decision from making an application for certification to represent the members of the bargaining unit of Beamish – Both applications (1998 and 2006) dismissed

K.J. BEAMISH CONSTRUCTION SERVICES LTD. RE LIUNA LOCAL 183 116

Construction Industry – Alteration of Jurisdiction – Trade Union – Trusteeship – After a local union withdrew from various programs of its parent union and took steps to affiliate itself with a rival union, the parent revoked the local's charter – The local claimed that the revocation violated sections 147 and 149 of the *Act* – The Board held that section 149 had no application as the parent did not attempt to retain any of the legal or institutional attributes of the local – A parent union is entitled to sever its relationship with a local, subject only to the just cause requirement of section 147 – The Board is not likely to weigh the merits of the parent's decision as long as it severs the relationship completely and does not do so for a coercive or punitive motive – The revocation of the charter would harm viable and stable collective bargaining and cause serious labour relations problems because (i) no collective agreement would apply to the geographical area under the local's jurisdiction and (ii) it would unravel a previous order made by the Board that prevented the irreconcilable differences between the parties from disrupting the entire construction industry and inflicting significant damage to the economic interests of both employers and members of the union – The parent would not be able to demonstrate just cause for the revocation of the charter unless it simultaneously took steps to transfer the rights, privileges and duties of the local to the employee bargaining agency – The Board found that the parent acted without just cause and declared the attempted revocation to be null and void

INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 25 101

Construction Industry – Bar – Certification – The Union filed an earlier application for certification in 2003 in which the Employer had given notice under section 8.1 – The application was "forgotten" after the representation vote and remained unresolved – In 2006, the Union filed a fresh application with respect to the same bargaining unit – Neither party made any reference to the 2003 application in their filings with the Board – After the Board brought the 2003 application to the parties' attention, the Union conceded the section 8.1 objection and requested that the 2003 application be dismissed without imposing a bar to future applications in accordance with subsection 10(4) – The Employer argued that because this was a construction industry application and there was a conflict between sections 160 and 10, section 160 took precedence and the mandatory bar in subsection 160(3) applied – The Board held that there was no conflict and subsection 10(4) applied to preclude the application of the mandatory bar –

The Board declined to impose a discretionary bar having regard to the substantial prejudice to the employees' right to seek union representation – The Board found it unnecessary to impose a discretionary bar so as to deter similar circumstances in the future in the future – The 2006 application was allowed to proceed

AMACON CONSTRUCTION LTD. AND/OR AMACON DEVELOPMENT GROUP INC.; RE LIUNA LOCAL 183 1

Construction Industry – Bargaining Rights – Bargaining Unit – Certification – Collective Agreement – In these six applications for certification, the issues were: (i) whether the Employers were bound by the EPSCA Agreement on the application date; (ii) whether the applications ought to be dismissed for a lack of labour relations purpose and (iii) the appropriate bargaining unit – The Employers were not members of EPSCA – When bidding for work tendered by Ontario Power Generation (OPG), the Employers must accept a "Labour Requirements Clause" (LRC) which obliged the Employers to abide by the EPSCA Agreement – The Board held that the Employers were not bound by the EPSCA Agreement because (a) the Employers had neither entered into voluntary recognition agreements with the Unions nor authorized EPSCA or OPG to be their agent by virtue of the LRC; (b) the LRC did not establish a direct connection between the Employers and the Unions party to the EPSCA Agreement; (c) contacting the Unions' hiring halls for employees did not constitute a voluntary recognition agreement, and (d) section 57 of the *Act* had no application as the Employers were not members of EPSCA – The Board refused the Employers' request to dismiss the applications for certifications as the Board found the *Act* did not confer on it the discretion to dismiss or refuse to entertain timely applications for certification, even if the applications are devoid of labour relations purpose – The Unions' request for a province-wide bargaining unit was rejected; rather, the appropriate bargaining unit was the Unions' trade or craft in all sectors of the construction industry other than the ICI sector in the Board Areas in which employees were working on the application date – Certificates issued in two; the others referred to Manager of Field Services

CANFORM STRUCTURES LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION 28

Construction Industry – Bargaining Unit – Certification – Sector Determination – The parties to these various applications for certification sought a determination from the Board for a number of issues relating to bargaining units – In an earlier decision (May 24, 2006), the Board confirmed that the appropriate bargaining unit is the bargaining unit described in the EPSCA collective agreement which bound the parties at the time the applications were filed – The Board assisted the parties in clarifying the work covered in the bargaining unit description – The Board confirmed that the bargaining unit described in the August 22, 2005 decision was limited to the electrical power systems sector, and held that the certificates should make specific reference to that sector – Finally, the Board made determinations respecting the correct names of the responding parties – Separate certificates to issue at a later date

ONTARIO POWER GENERATION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE LIUNA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE POWER WORKERS UNION CANADIAN UNION OF PUBLIC EMPLOYEES, C.L.C. LOCAL 1000 146

Construction Industry – Bargaining Unit – Certification – The union sought to expand its existing bargaining units by displacing itself and applying for certification for broader bargaining units – The broader units included employees who were already subject to collective agreements between the applicant and the responding parties but were not at work on the application date, plus all sectors of the construction industry in the Board Areas where the electricians employed by the responding parties were working on the application date – The applicant asserted that a displacement application was the only way for it to expand its bargaining unit which was necessary to ensure that its members would not be deprived of work by the responding parties' use of subcontractors bound by collective agreements with other trade unions – The Board held that the applicant was in the same position as any trade union seeking to displace another; thus the established policy that the appropriate bargaining unit in a displacement application is the unit held by the incumbent union applied unless there were clear and compelling reasons to hold otherwise – In this case there were no clear and compelling reasons as to why this long standing policy ought to be disregarded – The Board held that the appropriate bargaining unit was the one found in the applicant's collective agreement with each responding party – Matter continues

ONTARIO POWER GENERATION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCILS; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE LIUNA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE POWER WORKERS UNION CANADIAN UNION OF PUBLIC EMPLOYEES, C.L.C. LOCAL 1000 137

Construction Industry – Certification – Evidence – Judicial Review – Natural Justice – Practice and Procedure – Reconsideration – The Carpenters moved to set aside the decision of a single judge of Divisional Court permitting the employer to rely on an affidavit in support of its judicial review application of the Board's certification decision (see [2006] OLRB Rep. September/October 756) – A full panel of the Divisional Court held that the motions judge was not "clearly wrong" in concluding that one paragraph of the affidavit ought to be received by the reviewing panel in support of the employer's allegation that it was denied natural justice by the Board – The balance of the affidavit, however, should be struck because it contains material not before the Board and it is clear the Board's decision was rendered on the basis of evidence before it – The "new evidence" foundation for judicial review cannot succeed – Motion allowed in part

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND ONTARIO LABOUR RELATIONS BOARD 249

Construction Industry – Certification – Intervenor – A number of trade unions and employer bargaining agencies sought to intervene as *amicus curiae* in this certification application, arguing they wanted to present the Board with views regarding the undesirability of having the applicant trade union succeed and the potential destabilization in the construction industry should the applicant be found to be a trade union (its status has not yet been established) – The Board rejected the intervention of those seeking *amicus curiae* standing, relying on its own significant knowledge and experience in construction – When the Formwork Council challenged some of the voluntary recognition agreements relied on by the applicant, the applicant was invited to respond to the challenge – The Carpenters alleged the respondent employer was related to companies they were pursuing in another Board application – Application for certification joined with other Carpenter applications – Matter continues

PBS GENERAL CONTRACTORS INC.; RE CANADIAN CONSTRUCTION WORKERS' UNION; RE DRYWALL ACOUSTIC LATHING AND INSULATION, LOCAL 675; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE TABRCO MANAGEMENT LTD.; RE TARGET DRYWALL & ACOUSTICS LTD. 163

Construction Industry – Certification – Non-Construction Employer – The Labourers filed two applications for certification simultaneously (industrial and construction), seeking to represent the employees of ReNu engaged in the dismantling and removal of metal fixtures at a moribund steel manufacturing facility – The Board found that the predominant nature of the work the employees were performing was "demolition" and therefore construction – Secondly, the Board examined whether ReNu could qualify for the non-construction employer exemption – The Board found that ReNu was not performing construction work for which it could expect compensation from a third party; rather, ReNu was salvaging the metal and reselling it as part of the salvage operations – Application for construction certification dismissed – Non-Construction employer status granted – Application for industrial certification referred to Manager of Field Services to count ballots

RENU RECYCLING INC.; RE LIUNA LOCAL 837. 177

Construction Industry – Judicial Review – Parties – Related Employer – Sale of Business – Settlement – The Council brought a motion to quash the judicial review, characterizing it as prematurely seeking a review of an interim decision of the Board – In the 69/1(4) application the responding party employers brought a motion to the Board to dismiss the application because of Minutes of Settlement purporting to bind the Council and any of its affiliates from bringing such applications for ten years – The Board found that although the individual who signed the agreement on behalf of Local 586 was also the President of the Council there was no evidence that he had actual or ostensible authority to bind the Council – The Board dismissed the employers' motion and the sale of business/related employer applications continued before the Board, although the hearing on the merits had not yet commenced – The employers filed for judicial review – The court found this to be an exceptional or extraordinary situation that should properly be reviewed prior to the Board dealing with the merits – The court also assisted the parties in providing affidavit evidence to reflect the evidence that was before the Board

JOHNSON CONTROLS LTD., JOHNSON CONTROLS NOVA SCOTIA U.L.C., JOHNSON CONTROLS L.P., JOHNSON CONTROLS WORLD SERVICES LTD., BROOKFIELD MANAGEMENT SERVICES LTD. AND BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITIES MANAGEMENT SERVICES LTD.; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO.......... 284

Construction Industry – Judicial Review – *Public Sector Labour Relations Transition Act* – Related Employer – Sale of Business – The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the *PSLRTA* – The GECDSB sought judicial review of the Board's ruling – A majority of the Court confirmed the Board's finding that while the *PSLRTA* specifically precludes the application of s. 69 of the *Labour Relations Act, 1995* to events covered by that legislation, nothing in the *PSLRTA* prevented the Board from exercising its discretion under s. 1(4) to the same events — Application for judicial review dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE IBEW LOCAL 773; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 6; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LIUNA LOCAL 625 AND ONTARIO LABOUR RELATIONS BOARD 255

Construction Industry — Reference — The Minister of Labour asked the Board if he could accede to a joint request from the Employee and Employer Bargaining Agencies of the plumbers and pipefitters industry (ICI sector) to alter the designated bargaining unit description to include gasfitters and their apprentices — The Board found that the fact that gasfitter was not a distinct craft but rather a task performed by at least two skilled trades was a compelling reason against the requested amendment — The Board distinguished between work jurisdictional claims and descriptions of crafts; describing crafts in a general way promotes the flexibility of the industry to adapt to technological changes — Inserting work tasks may increase uncertainty and litigation in certification applications — The Board advised the Minister that the requested amendment would not serve the interests of the labour relations community and was not necessary to advance or protect the craft of plumber and pipefitter

MECHANICAL CONTRACTORS ASSOCIATION OF ONTARIO; RE IUOE LOCAL 793; RE ONTARIO SHEET METAL WORKERS AND ROOFERS CONFERENCE, SHEET METAL WORKERS INTERNATIONAL UNION LOCAL 285; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP 126

Construction Industry — Trusteeship — The Board issued reasons to support its finding of June 12, 2006 that LIUNA properly exerted its rights to impose trusteeship over Local 183, without violating either s. 147 or 149 of the Act — The Board examined the myriad proceedings and events leading up to the imposition of the trusteeship, including the hearing before and determination of the union-appointed Canadian Independent Hearings Officer (the Keller Award) — The Board found that LIUNA had not in any way altered the jurisdiction of 183 in breach of s. 147 — For purposes of s. 149, the Board looked at the Keller Award as well as the materials presented and arguments made before the Board, and held that the three preconditions for issue estoppel (as argued by LIUNA) had been met — The Board specifically refused to rely on supplementary affidavit material filed before it, stating that that evidence could have been presented to Keller but was not — The Board found that it is inconsistent with the core values of both parent and local to expend union funds for surreptitious surveillance to preserve the positions of those in power, or to approve the forgery of collective agreements — Issue estoppel applied — Trusteeship confirmed

UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183 231

Construction Industry Grievance — Abandonment — Bargaining Rights — Delay — Labourers 506 grieved that Burling Ranger had violated the provincial ICI agreement by failing to employ members of 506 or failing or refusing to subcontract work to subcontractors in contractual relations with the union — The Labourers relied on a collective agreement signed in 1970 by the applicant and Burling — The responding party argued that the union had abandoned its rights by failing to assert them as long ago as prior to the inception of provincial bargaining – The union served Burling with notice to bargain in the early 1970's, but the employer responded that it had no work in the geographic area – The Board heard evidence relating to subsequent work performed by Burling over an almost thirty-year period, without any assertions by the Labourers to rights under the collective agreement - Grievance dismissed

BURLING RANGER COMPANY INC.; RE LIUNA LOCAL 505 8

Construction Industry Grievance – Settlement – The Carpenters acknowledged they received a certified cheque from the responding party as part of a settlement – They further acknowledged having signed a release – The Carpenters lost the cheque and requested a hearing to enforce the settlement agreement – The Board found the responding party had lived up to its obligations; that the applicant received the consideration contemplated by the release, and that the loss or destruction of the cheque while in the applicant's possession does not make the responding party liable to replace it – Grievance referral dismissed

J & A GENERAL CONTRACTORS INC.; RE CARPENTERS AND ALLIED WORKERS, LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA 115

Construction Industry Grievance – The IBEW sought enforcement of the provincial collective agreement for the electrical maintenance work it performed for Comstock at the Redpath Sugar Plant – Comstock denied being bound to the collective agreement and asserted it had entered into a General Presidents' Maintenance Collective Agreement – In the alternative, Comstock argued the IBEW was estopped from enforcing the principal agreement – The Board surveyed the parties' historical relationship, earlier grievances, local agreements, membership authorizations and continued efforts of various protagonists to enter into a GPMCA – Relying on s. 57 of the Act, the Board found that Comstock is bound by the principal agreement by virtue of its membership in the greater Toronto Electrical Contractors' Association, notwithstanding the apparent conduct of the parties (including the implementation of the GPMCA) which points to the opposite conclusion – As such, and pursuant to s. 55 of the Act, the GPMCA could not be enforceable absent the consent of the parties to the principal agreement - The Board further found that the elements of estoppel had been made out, but applied a time restriction to its enforceability – Grievance allowed

COMSTOCK CANADA LTD.; RE IBEW LOCAL 353 65

Delay – Abandonment – Bargaining Rights – Construction Industry Grievance – Labourers 506 grieved that Burling Ranger had violated the provincial ICI agreement by failing to employ members of 506 or failing or refusing to subcontract work to subcontractors in contractual relations with the union – The Labourers relied on a collective agreement signed in 1970 by the applicant and Burling – The responding party argued that the union had abandoned its rights by failing to assert them as long ago as prior to the inception of provincial bargaining – The union served Burling with notice to bargain in the early 1970's, but the employer responded that it had no work in the geographic area – The Board heard evidence relating to subsequent work performed by Burling over an almost thirty-year period, without any assertions by the Labourers to rights under the collective agreement - Grievance dismissed

BURLING RANGER COMPANY INC.; RE LIUNA LOCAL 505 8

Delay – Abandonment – Bargaining Rights – Certification – Construction Industry – In 1998, Local 183 filed an application for certification for all the construction labourers of the respondent, Beamish – A vote took place and 23 of the 36 votes were challenged but the application was never disposed of – In November 2006 Local 183 brought an application for certification for the same bargaining unit – Beamish took the position that the 1998 application was still outstanding and that the 2006 application indicated Local 183's intention to withdraw the 1998 application – Beamish further argued that the Board should treat the 1998 application as having been withdrawn by Local 183, with a bar subject to subsection 7(10) of the Act – Local 183 offered no explanation for the delay or for why the 1998 application was never concluded – Absent any explanation for the delay, the Board dismissed the 1998 application as being abandoned as of the date of the present decision – The Board declined to characterize the 2006 application as a request to withdraw the 1998 application and thus determined that mandatory bars imposed pursuant to subsections 7(10) and 10(3) were not applicable – The Board did exercise its discretion pursuant to subsection 111(2)(k) and barred Local 183 for six months from the date of this decision from making an application for certification to represent the members of the bargaining unit of Beamish – Both applications (1998 and 2006) dismissed

K.J. BEAMISH CONSTRUCTION SERVICES LTD. RE LIUNA LOCAL 183 116

Delay – Duty of Fair Representation – Judicial Review – The applicant brought a motion before a single judge of the Divisional Court to overturn the Court's Registrar's dismissal of the application for judicial review for failure to perfect in a timely way (the applicant had lost a duty of fair representation complaint at the Board, because of undue delay) – The judge found no compelling reasons to vary the Registrar's ruling and confirmed there was nothing patently unreasonable about the Board's decision – Motion dismissed

KOSTANTINOS IAONNIDIS; RE ATU LOCAL 1572, CORPORATION OF THE CITY OF MISSISSAUGA, TRANSPORTATION AND WORKS DEPARTMENT, TRANSIT DIVISION 291

Discharge – Health and Safety – Reprisal – The applicant challenged her dismissal as a bus driver for the disabled – She was discharged after four incidents within a twelve-month period (three accidents and an instance of driving while her licence was suspended) – The applicant argued that every time she found a problem with her bus, or requested a change of bus because of an apparent malfunction, she was exercising her rights under the *Occupational Health and Safety Act* – The Board held (1) these concerns were handled by the maintenance department of the employer, (2) management was never made aware of them, and (3) these concerns could not be construed as an exercise of health and safety rights within the meaning of the Act – The Board found that progressive discipline was levied against the applicant in accordance with management policy and the collective agreement, and that termination was the appropriate response to the culminating incident – Application dismissed

TRANSHELP OF THE REGIONAL MUNICIPALITY OF PEEL; RE KYM URRY; RE CUPE LOCAL 966 215

Duty of Fair Representation – Delay – Judicial Review – The applicant brought a motion before a single judge of the Divisional Court to overturn the Court's Registrar's dismissal of the application for judicial review for failure to perfect in a timely way (the applicant had lost a duty of fair representation complaint at the Board, because of

undue delay) – The judge found no compelling reasons to vary the Registrar's ruling and confirmed there was nothing patently unreasonable about the Board's decision – Motion dismissed

KOSTANTINOS IAONNIDIS; RE ATU LOCAL 1572, CORPORATION OF THE CITY OF MISSISSAUGA, TRANSPORTATION AND WORKS DEPARTMENT, TRANSIT DIVISION 291

Duty of Fair Representation – Duty to Bargain in Good Faith – Unfair Labour Practice – These three applications concern (1) an unfair labour practice complaint brought by the union alleging the employer's failure to bargain in good faith; (2) an unfair labour practice complaint launched by individual employees against the employer; and (3) a complaint by the same employees that the trade union had not represented them fairly – Shortly after the union was certified, the employer announced the closure of its transportation division and the permanent lay-off of all the bargaining unit members – The union and employer negotiated, and the employees ratified, a closure agreement rather than a collective agreement – The Board found that the union failed to make out a *prima facie* case of a violation of s. 17 because the parties had reached an "agreement" that was enforceable by way of arbitration – The Board further found that individual employees have no standing to allege violations of s. 17 and 86, and have limited standing (not applicable in the present case) to complain about violations of s. 70 – Allegations of a violation of s. 72 were allowed to proceed, with a direction to the employees for further particulars – Finally, the alleged violation of s. 74 was allowed to proceed as well (in light of the arbitrability of the closure agreement), once again with a direction for further particulars – Matter proceeds

READY BAKE FOODS INC.; RE UNITED FOOD & COMMERCIAL WORKERS CANADA LOCAL 175; RE BRIAN LORENTZ ET AL 166

Duty to Bargain in Good Faith – Duty of Fair Representation – Unfair Labour Practice – These three applications concern (1) an unfair labour practice complaint brought by the union alleging the employer's failure to bargain in good faith; (2) an unfair labour practice complaint launched by individual employees against the employer; and (3) a complaint by the same employees that the trade union had not represented them fairly – Shortly after the union was certified, the employer announced the closure of its transportation division and the permanent lay-off of all the bargaining unit members – The union and employer negotiated, and the employees ratified, a closure agreement rather than a collective agreement – The Board found that the union failed to make out a *prima facie* case of a violation of s. 17 because the parties had reached an "agreement" that was enforceable by way of arbitration – The Board further found that individual employees have no standing to allege violations of s. 17 and 86, and have limited standing (not applicable in the present case) to complain about violations of s. 70 – Allegations of a violation of s. 72 were allowed to proceed, with a direction to the employees for further particulars – Finally, the alleged violation of s. 74 was allowed to proceed as well (in light of the arbitrability of the closure agreement), once again with a direction for further particulars – Matter proceeds

READY BAKE FOODS INC.; RE UNITED FOOD & COMMERCIAL WORKERS CANADA LOCAL 175; RE BRIAN LORENTZ ET AL 166

Employment Standards – Abuse of Process – Practice and Procedure – In this employee application for review, the Board had issued earlier decisions describing the applicant's inappropriate, disrespectful and disruptive behaviour – Ultimately the Board was forced to cut short a hearing day because of the employee's conduct, and seek submissions from the parties as to how to proceed – The employer argued that to continue would be an abuse of process, the applicant had not pleaded a *prima facie* case or, alternatively, the applicant should provide a medical assessment of his ability to proceed – The applicant sought the Vice-Chair's recusal, an order from the Board admonishing employer counsel's behaviour, and a broader investigation into his employment and discharge (including reprisal) – The Board refused to step down, confirmed that employer counsel's conduct had been courteous and restrained, and held that the breadth of the issues before it already encompassed the remedies the applicant was seeking – The Board terminated the hearing and dismissed the application because of the applicant's conduct

NOVAFLOW SYSTEMS INC.; RE OMER A. EL SAYED AND DIRECTOR OF EMPLOYMENT STANDARDS 130

Employment Standards – The Employer applied for review of an Order to Pay – Subsection 116(1) of the *Employment Standards Act, 2000* requires, as a pre-requisite to filing the application, the payment of the amount owing to the Director of Employment Standards in trust or the provision of an irrevocable letter of credit acceptable to the Director – The Employer did not pay the full amount specified in the Order to Pay; rather, it withheld an amount in respect of statutory deductions – The Director contended that the amount withheld in respect of statutory deductions was excessive and sought an order from the Board to increase the total amount payable into trust to 70% of the total amount owing – The Board held that nothing in subsection 116(1) expressly allows for the payment into trust of anything less than the full amount of the Order to Pay, nor is there any prejudice to require an applicant to pay the full amount – The Employer was ordered to pay the full amount into trust in order to perfect the application

QUEBECOR WORLD INC.; RE CARLO BINETTI AND DIRECTOR OF EMPLOYMENT STANDARDS.. 164

Employment Standards – The employer challenged the Notices of Contravention and Order to Pay issued in this matter, arguing that the employee had been offered and rejected reasonable alternative employment – The Board found that (a) an unequivocal offer was made in a series of memoranda addressed to employees, (b) the employee refused the offer by remaining silent and failing to take any action after receiving the offer, and (c) the alternative employment offered was reasonable – Training and proficiency requirements did not render the offer equivocal or mean that the employee could not likely perform the job offered – A period of training may be part of an offer of reasonable alternative employment – Any subjective expression of anxiety regarding the ability to perform the job offered was irrelevant if it had no objective basis – The employee was not entitled to rely on a medical condition to claim that the offer was unreasonable without having raised it first with the employer – Notices of Contravention rescinded and Order to Pay revoked

CASINO RAMA SERVICES INC.; RE WILLIS PAUL JR AND DIRECTOR OF EMPLOYMENT STANDARDS.. 45

Evidence – Certification – Construction Industry – Judicial Review – Natural Justice – Practice and Procedure – Reconsideration – The Carpenters moved to set aside the decision of a single judge of Divisional Court permitting the employer to rely on an affidavit in support of its judicial review application of the Board's certification decision (see [2006] OLRB Rep. September/October 756) – A full panel of the Divisional Court held that the motions judge was not "clearly wrong" in concluding that one paragraph of the affidavit ought to be received by the reviewing panel in support of the employer's allegation that it was denied natural justice by the Board – The balance of the affidavit, however, should be struck because it contains material not before the Board and it is clear the Board's decision was rendered on the basis of evidence before it – The "new evidence" foundation for judicial review cannot succeed – Motion allowed in part

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND ONTARIO LABOUR RELATIONS BOARD 249

Health and Safety – Discharge – Reprisal – The applicant challenged her dismissal as a bus driver for the disabled – She was discharged after four incidents within a twelve-month period (three accidents and an instance of driving while her licence was suspended) – The applicant argued that every time she found a problem with her bus, or requested a change of bus because of an apparent malfunction, she was exercising her rights under the *Occupational Health and Safety Act* – The Board held (1) these concerns were handled by the maintenance department of the employer, (2) management was never made aware of them, and (3) these concerns could not be construed as an exercise of health and safety rights within the meaning of the Act – The Board found that progressive discipline was levied against the applicant in accordance with management policy and the collective agreement, and that termination was the appropriate response to the culminating incident – Application dismissed

TRANSHELP OF THE REGIONAL MUNICIPALITY OF PEEL; RE KYM URRY; RE CUPE LOCAL 966 215

Health and Safety – The employer sought suspension of an order requiring it to develop and implement a written violence prevention program – The employer asserted that contrary to the inspector's order, it already had both anti-violence and anti-harassment policies and that the policies were part of the employer's orientation program – Further, the employer claimed there had never been any incidents of actual violence in the workplace – The Ministry argued the order was issued in response to specific threats of violence directed at one employee – The Board found that the inspector had ignored the existence of the employer's policies and the order failed to acknowledge the employer's efforts in dealing with the perceived threats – Since the employer successfully argued all three elements of the test for a suspension, the Board held that there were no grounds on which to defer to the inspector – Suspension granted

SKYJACK INC.; RE SUE HUTCHINSON, INSPECTOR 191

Interim Order – Unfair Labour Practice – The applicant sought interim reinstatement of five laser operators it alleged were laid off because of their participation in the applicant's organizing drive – The employer argued it had *bona fide* business reasons for the lay-offs, as well as for the choices of individuals it chose to lay off – The Board applied the criteria for interim relief found in s. 98 of the Act – For three of the employees, whom the Board found to be organizers, the Board was not able to conclude that their lay-offs were unrelated to the organizing campaign – For the other two employees, who were supporters but not organizers, the Board again could not conclude the employer's motives were completely unrelated to the union's drive – Interim order granted

CLAYSON STEEL (1988) INC.; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA).. 57

Intervenor - Certification - Construction Industry - A number of trade unions and employer bargaining agencies sought to intervene as *amicus curiae* in this certification application, arguing they wanted to present the Board with views regarding the undesirability of having the applicant trade union succeed and the potential destabilization in the construction industry should the applicant be found to be a trade union (its status has not yet been established) - The Board rejected the intervention of those seeking *amicus curiae* standing, relying on its own significant knowledge and experience in construction - When the Formwork Council challenged some of the voluntary recognition agreements relied on by the applicant, the applicant was invited to respond to the challenge - The Carpenters alleged the respondent employer was related to companies they were pursuing in another Board application - Application for certification joined with other Carpenter applications - Matter continues

PBS GENERAL CONTRACTORS INC.; RE CANADIAN CONSTRUCTION WORKERS' UNION; RE DRYWALL ACOUSTIC LATHING AND INSULATION, LOCAL 675; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE TABRCO MANAGEMENT LTD.; RE TARGET DRYWALL & ACOUSTICS LTD. 158

Judicial Review - Certification - Construction Industry - Evidence - Natural Justice - Practice and Procedure - Reconsideration - The Carpenters moved to set aside the decision of a single judge of Divisional Court permitting the employer to rely on an affidavit in support of its judicial review application of the Board's certification decision (see [2006] OLRB Rep. September/October 756) - A full panel of the Divisional Court held that the motions judge was not "clearly wrong" in concluding that one paragraph of the affidavit ought to be received by the reviewing panel in support of the employer's allegation that it was denied natural justice by the Board - The balance of the affidavit, however, should be struck because it contains material not before the Board and it is clear the Board's decision was rendered on the basis of evidence before it - The "new evidence" foundation for judicial review cannot succeed - Motion allowed in part

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND ONTARIO LABOUR RELATIONS BOARD.. 249

Judicial Review - Construction Industry - Parties - Related Employer - Sale of Business - Settlement - The Council brought a motion to quash the judicial review, characterizing it as prematurely seeking a review of an interim decision of the Board - In the 69.1(4) application the responding party employers brought a motion to the Board to dismiss the application because of Minutes of Settlement purporting to bind the Council and any of its affiliates from bringing such applications for ten years - The Board found that although the individual who signed the agreement on behalf of Local 586 was also the President of the Council there was no evidence that he had actual or ostensible authority to bind the Council - The Board dismissed the employers' motion and the sale of business related employer applications continued before the Board, although the hearing on the merits had not yet commenced - The employers filed for judicial review - The court found this to be an exceptional or extraordinary situation that should properly be reviewed prior to the Board dealing with the merits - The court also

assisted the parties in providing affidavit evidence to reflect the evidence that was before the Board

JOHNSON CONTROLS LTD., JOHNSON CONTROLS NOVA SCOTIA U.L.C., JOHNSON CONTROLS L.P., JOHNSON CONTROLS WORLD SERVICES LTD., BROOKFIELD MANAGEMENT SERVICES LTD. AND BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITIES MANAGEMENT SERVICES LTD.; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO.......... 284

Judicial Review – Construction Industry – *Public Sector Labour Relations Transition Act* – Related Employer – Sale of Business – The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the *PSLRTA* – The GECDSB sought judicial review of the Board's ruling – A majority of the Court confirmed the Board's finding that while the *PSLRTA* specifically precludes the application of s. 69 of the *Labour Relations Act, 1995* to events covered by that legislation, nothing in the *PSLRTA* prevented the Board from exercising its discretion under s. 1(4) to the same events – Application for judicial review dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE IBEW LOCAL 773; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 6; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LIUNA LOCAL 625 AND ONTARIO LABOUR RELATIONS BOARD.......... 255

Judicial Review – Delay – Duty of Fair Representation – The applicant brought a motion before a single judge of the Divisional Court to overturn the Court's Registrar's dismissal of the application for judicial review for failure to perfect in a timely way (the applicant had lost a duty of fair representation complaint at the Board, because of undue delay) – The judge found no compelling reasons to vary the Registrar's ruling and confirmed there was nothing patently unreasonable about the Board's decision – Motion dismissed

KOSTANTINOS IAONNIDIS; RE ATU LOCAL 1572, CORPORATION OF THE CITY OF MISSISSAUGA, TRANSPORTATION AND WORKS DEPARTMENT, TRANSIT DIVISION.......... 291

Membership Evidence – Certification – Practice and Procedure – Reconsideration – In the context of a reconsideration of a certification application where the trade union provided the Board with affidavit evidence from employees who swore they had not signed membership cards, the Board allowed the trade union to have the employees' signatures subjected to forensic analysis – As the request for reconsideration was proceeding to hearing, the union sought the Board's permission to disclose to the employer the identity of the person whose signature was challenged – Disclosure granted – Matter continues

LES BURCH & SON CONTRACTING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.......... 125

Natural Justice - Certification - Construction Industry - Evidence - Judicial Review - Practice and Procedure - Reconsideration - The Carpenters moved to set aside the decision of a single judge of Divisional Court permitting the employer to rely on an affidavit in support of its judicial review application of the Board's certification decision (see [2006] OLRB Rep. September/October 756) - A full panel of the Divisional Court held that the motions judge was not "clearly wrong" in concluding that one paragraph of the affidavit ought to be received by the reviewing panel in support of the employer's allegation that it was denied natural justice by the Board - The balance of the affidavit, however, should be struck because it contains material not before the Board and it is clear the Board's decision was rendered on the basis of evidence before it - The "new evidence" foundation for judicial review cannot succeed - Motion allowed in part

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND ONTARIO LABOUR RELATIONS BOARD 249

Non-Construction Employer - Certification - Construction Industry - The Labourers filed two applications for certification simultaneously (industrial and construction), seeking to represent the employees of ReNu engaged in the dismantling and removal of metal fixtures at a moribund steel manufacturing facility - The Board found that the predominant nature of the work the employees were performing was "demolition" and therefore construction - Secondly, the Board examined whether ReNu could qualify for the non-construction employer exemption - The Board found that ReNu was not performing construction work for which it could expect compensation from a third party; rather, ReNu was salvaging the metal and reselling it as part of the salvage operations - Application for construction certification dismissed - Non-Construction employer status granted - Application for industrial certification referred to Manager of Field Services to count ballots

RENU RECYCLING INC.; RE LIUNA LOCAL 837 177

Parties - Construction Industry - Judicial Review - Related Employer - Sale of Business - Settlement - The Council brought a motion to quash the judicial review, characterizing it as prematurely seeking a review of an interim decision of the Board - In the 69.1(4) application the responding party employers brought a motion to the Board to dismiss the application because of Minutes of Settlement purporting to bind the Council and any of its affiliates from bringing such applications for ten years - The Board found that although the individual who signed the agreement on behalf of Local 586 was also the President of the Council there was no evidence that he had actual or ostensible authority to bind the Council - The Board dismissed the employers' motion and the sale of business related employer applications continued before the Board, although the hearing on the merits had not yet commenced - The employers filed for judicial review - The court found this to be an exceptional or extraordinary situation that should properly be reviewed prior to the Board dealing with the merits - The court also assisted the parties in providing affidavit evidence to reflect the evidence that was before the Board

JOHNSON CONTROLS LTD., JOHNSON CONTROLS NOVA SCOTIA U.L.C., JOHNSON CONTROLS L.P., JOHNSON CONTROLS WORLD SERVICES LTD., BROOKFIELD MANAGEMENT SERVICES LTD. AND BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITIES MANAGEMENT SERVICES LTD.; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO 284

Practice and Procedure – Abuse of Process – Employment Standards – In this employee application for review, the Board had issued earlier decisions describing the applicant's inappropriate, disrespectful and disruptive behaviour – Ultimately the Board was forced to cut short a hearing day because of the employee's conduct, and seek submissions from the parties as to how to proceed – The employer argued that to continue would be an abuse of process, the applicant had not pleaded a *prima facie* case or, alternatively, the applicant should provide a medical assessment of his ability to proceed – The applicant sought the Vice-Chair's recusal, an order from the Board admonishing employer counsel's behaviour, and a broader investigation into his employment and discharge (including reprisal) – The Board refused to step down, confirmed that employer counsel's conduct had been courteous and restrained, and held that the breadth of the issues before it already encompassed the remedies the applicant was seeking – The Board terminated the hearing and dismissed the application because of the applicant's conduct

NOVAFLOW SYSTEMS INC.; RE OMER A. EL SAYED AND DIRECTOR OF EMPLOYMENT STANDARDS 130

Practice and Procedure – Certification – Membership Evidence – Reconsideration – In the context of a reconsideration of a certification application where the trade union provided the Board with affidavit evidence from employees who swore they had not signed membership cards, the Board allowed the trade union to have the employees' signatures subjected to forensic analysis – As the request for reconsideration was proceeding to hearing, the union sought the Board's permission to disclose to the employer the identity of the person whose signature was challenged – Disclosure granted – Matter continues

LES BURCH & SON CONTRACTING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.. 125

Practice and Procedure – Certification – Construction Industry – Evidence – Judicial Review – Natural Justice – Reconsideration – The Carpenters moved to set aside the decision of a single judge of Divisional Court permitting the employer to rely on an affidavit in support of its judicial review application of the Board's certification decision (see [2006] OLRB Rep. September/October 756) – A full panel of the Divisional Court held that the motions judge was not "clearly wrong" in concluding that one paragraph of the affidavit ought to be received by the reviewing panel in support of the employer's allegation that it was denied natural justice by the Board – The balance of the affidavit, however, should be struck because it contains material not before the Board and it is clear the Board's decision was rendered on the basis of evidence before it – The "new evidence" foundation for judicial review cannot succeed – Motion allowed in part

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND ONTARIO LABOUR RELATIONS BOARD.. 249

Public Sector Labour Relations Transition Act – Construction Industry – Judicial Review – Related Employer – Sale of Business – The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the *PSLRTA* – The GECDSB sought judicial review of the Board's ruling – A majority of the Court confirmed the Board's finding that while the *PSLRTA* specifically precludes the application of s. 69 of the *Labour Relations Act, 1995* to events covered by that legislation, nothing in the *PSLRTA* prevented the Board from exercising its discretion under s. 1(4) to the same events – Application for judicial review dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE IBEW LOCAL 773; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 6; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LIUNA LOCAL 625 AND ONTARIO LABOUR RELATIONS BOARD........ 255

Reconsideration – Certification – Membership Evidence – Practice and Procedure – In the context of a reconsideration of a certification application where the trade union provided the Board with affidavit evidence from employees who swore they had not signed membership cards, the Board allowed the trade union to have the employees' signatures subjected to forensic analysis – As the request for reconsideration was proceeding to hearing, the union sought the Board's permission to disclose to the employer the identity of the person whose signature was challenged – Disclosure granted – Matter continues

LES BURCH & SON CONTRACTING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL........ 125

Reconsideration – Certification – Construction Industry – Evidence – Judicial Review – Natural Justice – Practice and Procedure – The Carpenters moved to set aside the decision of a single judge of Divisional Court permitting the employer to rely on an affidavit in support of its judicial review application of the Board's certification decision (see [2006] OLRB Rep. September/October 756) – A full panel of the Divisional Court held that the motions judge was not "clearly wrong" in concluding that one paragraph of the affidavit ought to be received by the reviewing panel in support of the employer's allegation that it was denied natural justice by the Board – The balance of the affidavit, however, should be struck because it contains material not before the Board and it is clear the Board's decision was rendered on the basis of evidence before it – The "new evidence" foundation for judicial review cannot succeed – Motion allowed in part

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND ONTARIO LABOUR RELATIONS BOARD........ 249

Reference – *Ambulance Services Collective Bargaining Act, 2001* – The City of Cornwall sought a Board-ordered Essential Services Agreement (ESA) for its ambulance drivers – Shortly thereafter, the Minister of Labour asked the Board whether he had the authority to issue a "no board" report – The Union opposed the City's application to the Board on the basis that (a) the parties had agreed to settle all future collective agreements by interest arbitration if necessary; and (b) the parties had already agreed to an ESA for the current round of bargaining – The Board found that there had been no agreement to "perpetual" interest arbitration due to: (1) the lack of "clearest possible language" indicating such in the memorandum of agreement; (2) the failure of the parties' bargaining history to demonstrate the offer and acceptance of the alleged terms; (3) and the conduct of the parties that belied the existence of such an agreement

– The Board found that the ESA was not agreed to by the employer as the union did not present the final ESA to the City for approval after incorporating the terms requested by the City – The City's application was allowed to proceed – The Minister was advised that he had the authority to issue a "no board" report

THE CORPORATION OF THE CITY OF CORNWALL; RE CUPE LOCAL 3251 PARA 198

Reference – Construction Industry – The Minister of Labour asked the Board if he could accede to a joint request from the Employee and Employer Bargaining Agencies of the plumbers and pipefitters industry (ICI sector) to alter the designated bargaining unit description to include gasfitters and their apprentices – The Board found that the fact that gasfitter was not a distinct craft but rather a task performed by at least two skilled trades was a compelling reason against the requested amendment – The Board distinguished between work jurisdictional claims and descriptions of crafts; describing crafts in a general way promotes the flexibility of the industry to adapt to technological changes – Inserting work tasks may increase uncertainty and litigation in certification applications – The Board advised the Minister that the requested amendment would not serve the interests of the labour relations community and was not necessary to advance or protect the craft of plumber and pipefitter

MECHANICAL CONTRACTORS ASSOCIATION OF ONTARIO; RE IUOE LOCAL 793; RE ONTARIO SHEET METAL WORKERS AND ROOFERS CONFERENCE, SHEET METAL WORKERS INTERNATIONAL UNION LOCAL 285; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP 126

Related Employer – Construction Industry – Judicial Review – Parties – Sale of Business – Settlement – The Council brought a motion to quash the judicial review, characterizing it as prematurely seeking a review of an interim decision of the Board – In the 69/1(4) application the responding party employers brought a motion to the Board to dismiss the application because of Minutes of Settlement purporting to bind the Council and any of its affiliates from bringing such applications for ten years – The Board found that although the individual who signed the agreement on behalf of Local 586 was also the President of the Council there was no evidence that he had actual or ostensible authority to bind the Council – The Board dismissed the employers' motion and the sale of business/related employer applications continued before the Board, although the hearing on the merits had not yet commenced – The employers filed for judicial review – The court found this to be an exceptional or extraordinary situation that should properly be reviewed prior to the Board dealing with the merits – The court also assisted the parties in providing affidavit evidence to reflect the evidence that was before the Board

JOHNSON CONTROLS LTD., JOHNSON CONTROLS NOVA SCOTIA U.L.C., JOHNSON CONTROLS L.P., JOHNSON CONTROLS WORLD SERVICES LTD., BROOKFIELD MANAGEMENT SERVICES LTD. AND BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITIES MANAGEMENT SERVICES LTD.; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO.. 285

Related Employer – Construction Industry – Judicial Review – *Public Sector Labour Relations Transition Act* – Sale of Business – The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the *PSLRTA* – The GECDSB sought judicial review of the Board's ruling – A majority of the Court confirmed the Board's finding that while the *PSLRTA* specifically precludes the application of s. 69 of the *Labour Relations Act, 1995* to events covered by that legislation, nothing in the *PSLRTA* prevented the Board from exercising its discretion under s. 1(4) to the same events – Application for judicial review dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE IBEW LOCAL 773; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 6; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LIUNA LOCAL 625 AND ONTARIO LABOUR RELATIONS BOARD 255

Reprisal – Discharge – Health and Safety – The applicant challenged her dismissal as a bus driver for the disabled – She was discharged after four incidents within a twelve-month period (three accidents and an instance of driving while her licence was suspended) – The applicant argued that every time she found a problem with her bus, or requested a change of bus because of an apparent malfunction, she was exercising her rights under the *Occupational Health and Safety Act* – The Board held (1) these concerns were handled by the maintenance department of the employer, (2) management was never made aware of them, and (3) these concerns could not be construed as an exercise of health and safety rights within the meaning of the Act – The Board found that progressive discipline was levied against the applicant in accordance with management policy and the collective agreement, and that termination was the appropriate response to the culminating incident – Application dismissed

TRANSHELP OF THE REGIONAL MUNICIPALITY OF PEEL; RE KYM URRY; RE CUPE LOCAL 966 215

Sale of Business – Construction Industry – Judicial Review – Parties – Related Employer – Settlement – The Council brought a motion to quash the judicial review, characterizing it as prematurely seeking a review of an interim decision of the Board – In the 69/1(4) application the responding party employers brought a motion to the Board to dismiss the application because of Minutes of Settlement purporting to bind the Council and any of its affiliates from bringing such applications for ten years – The Board found that although the individual who signed the agreement on behalf of Local 586 was also the President of the Council there was no evidence that he had actual or ostensible authority to bind the Council – The Board dismissed the employers' motion and the sale of business related employer applications continued before the Board, although the hearing on the merits had not yet commenced – The employers filed for judicial review – The court found this to be an exceptional or extraordinary situation that should properly be reviewed prior to the Board dealing with the merits – The court also assisted the parties in providing affidavit evidence to reflect the evidence that was before the Board

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Sale of Business – Construction Industry – Judicial Review – *Public Sector Labour Relations Transition Act* – Related Employer – The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the *PSLRTA* – The GECDSB sought judicial review of the Board's ruling – A majority of the Court confirmed the Board's finding that while the *PSLRTA* specifically precludes the application of s. 69 of the *Labour Relations Act, 1995* to events covered by that legislation, nothing in the *PSLRTA* prevented the Board from exercising its discretion under s. 1(4) to the same events – Application for judicial review dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE IBEW LOCAL 773; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 6; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LIUNA LOCAL 625 AND ONTARIO LABOUR RELATIONS BOARD.. 255

Sector Determination – Bargaining Unit – Certification – Construction Industry – The parties to these various applications for certification sought a determination from the Board for a number of issues relating to bargaining units – In an earlier decision (May 24, 2006), the Board confirmed that the appropriate bargaining unit is the bargaining unit described in the EPSCA collective agreement which bound the parties at the time the applications were filed – The Board assisted the parties in clarifying the work covered in the bargaining unit description – The Board confirmed that the bargaining unit described in the August 22, 2005 decision was limited to the electrical power systems sector, and held that the certificates should make specific reference to that sector – Finally, the Board made determinations respecting the correct names of the responding parties – Separate certificates to issue at a later date

ONTARIO POWER GENERATION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE LIUNA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE POWER WORKERS UNION CANADIAN UNION OF PUBLIC EMPLOYEES, C.L.C. LOCAL 1000........................ 146

Security Guards – Certification – Conflict of Interest – The employer objected to the certification of a bargaining unit of security guards at its client AA, asserting that a conflict of interest would arise because a local of the applicant holds bargaining rights for two other groups of AA's employees – Although the parties focused their submissions on the extent that the guards monitor AA's employees, the Board found that monitoring made up only a small part of the guards' duties – Even the guards' obligation to search individual employees' vehicles in specific circumstances did not give rise to the conflict of interest contemplated by paragraph 1 of s. 14(5) – Certificate granted

HAWTHORNE SECURITY & COMMUNICATIONS INC.; RE IAM......................... 91

Settlement – Construction Industry – Judicial Review – Parties – Related Employer – Sale of Business – The Council brought a motion to quash the judicial review, characterizing it as prematurely seeking a review of an interim decision of the Board – In the 69/1(4)

application the responding party employers brought a motion to the Board to dismiss the application because of Minutes of Settlement purporting to bind the Council and any of its affiliates from bringing such applications for ten years – The Board found that although the individual who signed the agreement on behalf of Local 586 was also the President of the Council there was no evidence that he had actual or ostensible authority to bind the Council – The Board dismissed the employers' motion and the sale of business related employer applications continued before the Board, although the hearing on the merits had not yet commenced – The employers filed for judicial review – The court found this to be an exceptional or extraordinary situation that should properly be reviewed prior to the Board dealing with the merits – The court also assisted the parties in providing affidavit evidence to reflect the evidence that was before the Board

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Settlement – Construction Industry Grievance – The Carpenters acknowledged they received a certified cheque from the responding party as part of a settlement – They further acknowledged having signed a release – The Carpenters lost the cheque and requested a hearing to enforce the settlement agreement – The Board found the responding party had lived up to its obligations; that the applicant received the consideration contemplated by the release, and that the loss or destruction of the cheque while in the applicant's possession does not make the responding party liable to replace it – Grievance referral dismissed

J & A GENERAL CONTRACTORS INC.; RE CARPENTERS AND ALLIED WORKERS, LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA.. 115

Trade Union – Alteration of Jurisdiction – Construction industry – Trusteeship – After a local union withdrew from various programs of its parent union and took steps to affiliate itself with a rival union, the parent revoked the local's charter – The local claimed that the revocation violated sections 147 and 149 of the *Act* – The Board held that section 149 had no application as the parent did not attempt to retain any of the legal or institutional attributes of the local – A parent union is entitled to sever its relationship with a local, subject only to the just cause requirement of section 147 – The Board is not likely to weigh the merits of the parent's decision as long as it severs the relationship completely and does not do so for a coercive or punitive motive – The revocation of the charter would harm viable and stable collective bargaining and cause serious labour relations problems because (i) no collective agreement would apply to the geographical area under the local's jurisdiction and (ii) it would unravel a previous order made by the Board that prevented the irreconcilable differences between the parties from disrupting the entire construction industry and inflicting significant damage to the economic interests of both employers and members of the union – The parent would not be able to demonstrate just cause for the revocation of the charter unless it simultaneously took steps to transfer the rights, privileges and duties of the local to the employee bargaining agency – The Board found that the parent acted without just cause and declared the attempted revocation to be null and void

INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 25 101

Trusteeship – Alteration of Jurisdiction – Construction industry – Trade Union – After a local union withdrew from various programs of its parent union and took steps to affiliate itself with a rival union, the parent revoked the local's charter – The local claimed that the revocation violated sections 147 and 149 of the *Act* – The Board held that section 149 had no application as the parent did not attempt to retain any of the legal or institutional attributes of the local – A parent union is entitled to sever its relationship with a local, subject only to the just cause requirement of section 147 – The Board is not likely to weigh the merits of the parent's decision as long as it severs the relationship completely and does not do so for a coercive or punitive motive – The revocation of the charter would harm viable and stable collective bargaining and cause serious labour relations problems because (i) no collective agreement would apply to the geographical area under the local's jurisdiction and (ii) it would unravel a previous order made by the Board that prevented the irreconcilable differences between the parties from disrupting the entire construction industry and inflicting significant damage to the economic interests of both employers and members of the union – The parent would not be able to demonstrate just cause for the revocation of the charter unless it simultaneously took steps to transfer the rights, privileges and duties of the local to the employee bargaining agency – The Board found that the parent acted without just cause and declared the attempted revocation to be null and void

INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 25 101

Trusteeship – Construction Industry – The Board issued reasons to support its finding of June 12, 2006 that LIUNA properly exerted its rights to impose trusteeship over Local 183, without violating either s. 147 or 149 of the Act – The Board examined the myriad proceedings and events leading up to the imposition of the trusteeship, including the hearing before and determination of the union-appointed Canadian Independent Hearings Officer (the Keller Award) – The Board found that LIUNA had not in any way altered the jurisdiction of 183 in breach of s. 147 – For purposes of s. 149, the Board looked at the Keller Award as well as the materials presented and arguments made before the Board, and held that the three preconditions for issue estoppel (as argued by LIUNA) had been met – The Board specifically refused to rely on supplementary affidavit material filed before it, stating that that evidence could have been presented to Keller but was not – The Board found that it is inconsistent with the core values of both parent and local to expend union funds for surreptitious surveillance to preserve the positions of those in power, or to approve the forgery of collective agreements – Issue estoppel applied – Trusteeship confirmed

UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183 231

Unfair Labour Practice – Duty of Fair Representation – Duty to Bargain in Good Faith – These three applications concern (1) an unfair labour practice complaint brought by the union alleging the employer's failure to bargain in good faith; (2) an unfair labour practice complaint launched by individual employees against the employer; and (3) a complaint by the same employees that the trade union had not represented them fairly – Shortly after the union was certified, the employer announced the closure of its transportation division and the permanent lay-off of all the bargaining unit members – The union and employer negotiated, and the employees ratified, a closure agreement rather than a collective agreement – The Board found that the union failed to make out a *prima facie* case of a violation of s. 17 because the parties had reached an "agreement" that was enforceable by way of arbitration – The Board further found that individual employees have no standing to allege violations of s. 17 and 86, and have limited standing (not applicable in the present case) to complain about violations of s. 70 – Allegations of a violation of s. 72 were allowed to proceed, with a direction to the employees for further particulars – Finally, the alleged violation of s. 74 was allowed to proceed as well (in light of the arbitrability of the closure agreement), once again with a direction for further particulars – Matter proceeds

READY BAKE FOODS INC.; RE UNITED FOOD & COMMERCIAL WORKERS CANADA LOCAL 175; RE BRIAN LORENTZ ET AL 166

Unfair Labour Practice – Interim Order – The applicant sought interim reinstatement of five laser operators it alleged were laid off because of their participation in the applicant's organizing drive – The employer argued it had *bona fide* business reasons for the lay-offs, as well as for the choices of individuals it chose to lay off – The Board applied the criteria for interim relief found in s. 98 of the Act – For three of the employees, whom the Board found to be organizers, the Board was not able to conclude that their lay-offs were unrelated to the organizing campaign – For the other two employees, who were supporters but not organizers, the Board again could not conclude the employer's motives were completely unrelated to the union's drive – Interim order granted

CLAYSON STEEL (1988) INC.; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA).. 57

3821-05-R Universal Workers Union, Labourers' International Union of North America Local 183, Applicant v. **Amacon Construction Ltd. and/or Amacon Development Group Inc.**, Responding Parties.

Bar – Certification – Construction Industry – The Union filed an earlier application for certification in 2003 in which the Employer had given notice under section 8.1 – The application was "forgotten" after the representation vote and remained unresolved – In 2006, the Union filed a fresh application with respect to the same bargaining unit – Neither party made any reference to the 2003 application in their filings with the Board – After the Board brought the 2003 application to the parties' attention, the Union conceded the section 8.1 objection and requested that the 2003 application be dismissed without imposing a bar to future applications in accordance with subsection 10(4) – The Employer argued that because this was a construction industry application and there was a conflict between sections 160 and 10, section 160 took precedence and the mandatory bar in subsection 160(3) applied – The Board held that there was no conflict and subsection 10(4) applied to preclude the application of the mandatory bar – The Board declined to impose a discretionary bar having regard to the substantial prejudice to the employees' right to seek union representation – The Board found it unnecessary to impose a discretionary bar so as to deter similar circumstances in the future – The 2006 application was allowed to proceed

BEFORE: *Peter F. Chauvin*, Vice-Chair, and Board Members *G. Pickell* and *R. Baxter*.

APPEARANCES: *A. Minsky* and *H. Pereira* appeared for the applicant; *David Daniels* and *Hannah Obeid* appeared for the responding parties.

DECISION OF THE BOARD: February 8, 2007

1. This is an application for certification commenced under section 128.1 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act").

2. This decision pertains only to a preliminary issue. The facts that are relevant to the preliminary issue are as follows.

The Facts

3. On January 10, 2003 the applicant ("Local 183"), filed an application for certification under section 8 of the Act ("the 2003 application") regarding the employees of Amacon Construction Ltd. and/or Amacon Development Group Inc. ("Amacon"). Local 183 requested a bargaining unit consisting of all construction labourers of Amacon in all sectors of the construction industry, other than the ICI sector, in Board area 8, save and except working foreman and persons above the rank of working foreman.

4. Amacon gave notice of a section 8.1 objection. The Board found that the section 8.1 objection could be numerically significant. Accordingly, a vote was conducted, but the ballot box was sealed, pending the determination of the employee list.

5. However, following the vote, there were no further hearing dates and no resolution of the 2003 application. Rather, the 2003 application went dormant.

6. On February 18, 2006 Local 183 filed this application ("the 2006 application") in which it seeks bargaining rights for the same bargaining unit. Local 183 made no mention of its 2003 application when it filed its 2006 application.

7. Similarly, Amacon made no mention of the 2003 application in its response to the 2006 application. It would appear that Local 183 and Amacon had either completely forgotten about the 2003 application, or, for whatever other reason, did not bring it to the Board's attention.

8. There were discrepancies between the list of employees put forward by Local 183 and Amacon. Accordingly, the first two days of hearings to resolve the employee list were held on May 1, and June 9, 2006. Further dates were scheduled to continue with the 2006 application. However, before any further hearing dates were held, the Board discovered that the 2003 application was still outstanding. This was brought to the parties' attention.

9. On December 29, 2006 Local 183 wrote to the Board, stating that it believed that the 2003 application had been abandoned or administratively closed. However, Local 183 stated that if the 2003 application had not been deemed to have been abandoned or administratively closed, it conceded the objection under section 8.1 and requested the Board to dismiss the 2003 application pursuant to paragraph 7 of section 8.1(5) without a bar to any future applications, in accordance with section 10(4).

10. Amacon did not respond to that letter or provide any other submissions to the Board regarding that issue.

11. By decision dated January 24, 2007 the Board (differently constituted) dismissed the 2003 application pursuant to paragraph 7 of section 8.1(5). In keeping with the Board's usual practice, the decision does not address the issue of whether any bar to any further application arises as a result of the decision. Rather, that issue was left to the panel that considers the subsequent application.

12. The next day of hearing regarding the 2006 application was scheduled for January 26, 2007. The Board informed the parties that it would consider, on January 26, 2007, whether the Board's decision regarding the 2003 application has any impact upon the 2006 application.

The Issue

13. Both Local 183 and Amacon have confirmed that they are not attempting to challenge or reconsider the Board's January 24, 2007 decision. They note that the January 24, 2007 decision does not address the issue of whether a bar against future applications should be imposed. They agree that it is this panel of the Board that normally determines that issue. The parties submit that the issue is whether, in view of the January 24, 2007 decision, this panel of the Board should impose such a bar, and whether this panel can continue with the adjudication of the 2006 application.

Local 183's Submissions

14. Local 183's position is relatively simple. Local 183 submits that no bar should be imposed and that the Board can continue with the adjudication of the 2006 application, unaffected by the Board's decision dismissing the 2003 application.

15. Local 183 states that the 2003 application has been dismissed pursuant to paragraph 7 of section 8.1(5) and submits that section 10(4) applies whenever either an industrial application or a construction application that was filed under section 8 is dismissed under paragraph 7 of section 8.1(5). As a result, Local 183 submits that no mandatory bar is imposed under section 10(3). Local 183 also submits that no discretionary bar should be imposed under section 111(2)(k) because one of the purposes of the Act is to facilitate collective bargaining and imposing such a discretionary bar would impede collective bargaining.

16. With regard to industrial applications, Local 183 cites *Renaissance Fallsview Hotel*, [1999] O.L.R.D. No. 4106, Board File No. 2449-99-R (December 16, 1999); *Supply Chain Management Inc.*, [2000] OLRB Rep. March/April 397 (March 27, 2000); *Supply Chain Management Inc.*, [2000] OLRB Rep. May/June 560 (June 21, 2000); *Cashway Building Centres Ltd.*, [2001] O.L.R.D. No. 2606, Board File No. 0124-01-R (June 29, 2001). *Hussmann Canada Inc.*, [2005] O.L.R.D. No. 2443, Board File No. 0362-05-R (June 16, 2005). With regard to construction applications, Local 183 cites *Valemont Homes Meadowvale Inc.*, [2000] O. L. R. D. No. 1548; Board File No. 3850-00-R (April 20, 2001). *Custom Aluminum Inc.*, [2004] O. L. R. D. No. 2044, Board File No. 1410-040R (August 12, 2004). *Hussmann Canada Inc.*, [2005] O.L.R.D. No. 2443. In all of these cases, no bar was imposed under either section 10(3) or section 111(2)(k) after the application was dismissed pursuant to paragraph 7 of section 8.1(5).

17. In the alternative, Local 183 submits that if the Board finds that a bar must be imposed, that bar should be deemed to have been imposed at least one year ago so that the bar does not affect the 2006 application. Local 183 submits that *Access Security Professionals Inc.*, [2005] O.L.R.D. No. 703, Board File No. 2220-03-R (February 1, 2005), states that the Board has the authority to do this.

18. Local 183 submits that the Board should apply section 111(3)(b) and consider the 2006 application. Local 183 submits that *The Watson Manufacturing Company of Paris Limited*, [1968] OLRB Rep. Aug. 441 stands for the principle that the Board will refuse to entertain the subsequent application pursuant to section 111(3)(c) only if the Board has proceeded under section 111(3)(b) with the earlier application and the Board has certified the applicant in the earlier application. Local 183 submits that the fact that the May 1, and June 9, 2006 hearing dates have already been held does not preclude the Board from applying section 111(3)(b). Local 183 notes that section 111(3) uses the word "may" rather than "shall". In view of this, Local 183 also submits that the Board is not limited to only the three options set out in section 111(3)(a), (b) and (c). Lastly, Local 183 submits that section 111(3) does not apply when the two applications are made by the same Union. In this regard, Local 183 relies upon *Cashway Building Centres*.

Amacon's Submissions

19. Amacon's position is more complex. Amacon requests the Board to adopt the type of approach to the interpretation of the construction industry provisions that was applied in *Bayview-*

Wellington Homes Inc., [1999] OLRB Rep. Nov./Dec. 954 so as to find that only section 160(3) applies whenever a construction application that was filed under section 8 is dismissed, for any reason, with the result that a bar is always imposed. Amacon's reasoning for this is as follows.

20. Amacon agrees that section 10(4) applies when an industrial application is dismissed under paragraph 7 of section 8.1(5). However, Amacon emphasizes that this is a construction industry application, not an industrial application. Amacon notes that section 126.1(3) states that sections 126 to 168 set out special rules with respect to the construction industry, with the result that if there is a conflict between section 160 and section 10, section 160 prevails. Amacon submits that section 160 does conflict with section 10.

21. Amacon notes that section 160(1) is more specific than section 10(1), in that section 160(1) specifies that "the Board shall issue one certificate that is confined to the industrial, commercial and institutional sector and another certificate in relation to all other sectors in the appropriate geographic area or areas". Amacon notes that section 10(1) does not contain this language.

22. Similarly, Amacon notes that section 160(3) is also more specific than section 10(3), in that section 160(3) states that the Board shall not consider another application for certification "by the employee bargaining agency or an affiliated bargaining agent". Amacon notes that section 10(3) does not contain this language.

23. Also, Amacon notes that section 160 does not contain sections that are similar to sections 10(2) and 10(4), which make it clear that a bar is imposed when the application is dismissed following a vote, and that a bar is not imposed when the application is dismissed pursuant to paragraph 7 of section 8.1(5). In contrast, Amacon notes that section 160 currently contains no subsection that requires the dismissal of an application (Amacon notes that prior to 2001 s. 160(2) stated that section 10(2) applied), but section 160(3) nevertheless broadly states that it applies "if the Board dismisses an application under this section", without distinguishing between dismissals following a vote and dismissals pursuant to paragraph 7 of section 8.1(5).

24. In view of the absence of sections similar to sections 10(2) and 10(4), the other conflicts discussed above, and the broad language of section 160(3), Amacon submits that only section 160(3) applies whenever a construction application that was filed under section 8 is dismissed, even when it is dismissed pursuant to paragraph 7 of section 8.1(5), and that the mandatory bar in section 160(3) must be imposed.

Analysis

25. The Board prefers the position put forward by Local 183, for the following reasons.

26. Paragraph 7 of section 8.1(5) requires the Board to dismiss an application if less than 40% of the persons in the bargaining unit were members of the union when the application was filed. The 2003 application was dismissed pursuant to paragraph 7 of section 8.1(5). Sections 10 and 160 state that:

> **10.** (1) The Board shall certify a trade union as the bargaining agent of the employees in a bargaining unit that is determined by the Board to be

appropriate for collective bargaining if more than 50 per cent of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union.

(2) The Board shall not certify the trade union as bargaining agent and shall dismiss the application for certification if 50 per cent or less of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union.

(3) If the Board dismisses an application for certification under this section, the Board shall not consider another application for certification by any trade union as the bargaining agent of any employee that was in the bargaining unit proposed in the original application until one year after the original application is dismissed.

(3.1) Despite subsection (3), the Board may consider an application for certification by a trade union as the bargaining agent for employees in a bargaining unit that includes an employee who was in the bargaining unit proposed in the original application if,

(a) the position of the employee at the time the original application was made was different from his or her position at the time the new application was made; and

(b) the employee would not have been in the bargaining unit proposed in the new application had he or she still been occupying the original position when the new application was made.

(3.2) Subsection (3) does not apply if the trade union whose application was dismissed is a trade union that the Board is prohibited from certifying under section 15.

(4) For greater certainty, subsection (3) does not apply with respect to a dismissal under paragraph 7 of subsection 8.1(5).

160. (1) Subject to section 11.1 the Board shall certify the trade unions on whose behalf an application for certification is brought as the bargaining agent of the employees in the bargaining unit if more than 50 per cent of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade unions. The Board shall issue one certificate that is confined to the industrial, commercial and institutional sector and another certificate in relation to all other sectors in the appropriate geographic area or areas.

(2) If the Board certifies the trade unions on whose behalf an application for certification is brought as the bargaining agent of the employees in the bargaining unit under clause 11(2)(c), the Board shall issue one certificate that is confined to the industrial, commercial and institutional sector and another certificate in relation to all other sectors in the appropriate geographic area or areas.

> (3) If the Board dismisses an application for certification under this section, the Board shall not consider another application for certification by the employee bargaining agency or the affiliated bargaining agent or agents to certify the trade unions as bargaining agent for the employees in the bargaining unit until one year has elapsed after the dismissal.
>
> (4) This section does not apply when an application for certification is being dealt with under section 128.1.

27. The Board finds that section 10(4) applies to this matter rather than section 160(3). In *Custom Aluminum* and *Hussmann Canada* the Board dismissed construction industry applications for certification pursuant to paragraph 7 of section 8.1(5) and did not impose a bar, notwithstanding that the employer requested that the Board impose a bar.

28. In *Custom Aluminum* the Board stated that "the impact of a dismissal under section 8.1(5)7 of the Act is that no bar would restrict the union from bringing a fresh certification application". The Board also stated, at paragraph 11, that:

> Consequently, the union did not act improperly by conceding that the employer's estimate of the number of employees in the bargaining unit was correct. The effect of the union doing so was that the employer's s. 8.1 notice became decisive. While this situation appears to be akin to a union withdrawing its application after the count of a representation vote, there is an important difference. The representation vote has not been completed where there are outstanding ballots at issue. Even if, in the unlikely event, the union were to win the vote, s. 8.1 can apply to dismiss the application if the requisite 40% is missing: *Renaissance Fallsview Hotel*, [1999] O.L.R.D. No. 4160. There is no bar in that situation, and there is no reason why there should be a bar in this. The provisions of s. 8.1 are such that, if a s. 8.1 notice has not been withdrawn by the employer, the union is entitled to withdraw its status challenges and yield to the s. 8.1 notice, without incurring a bar.

29. In *Hussmann Canada*, the Board accepted the union's position that section 10(4) applied with the result that no bar was imposed. The Board stated, at paragraph 22, that:

> Thus, once the applicant accepts the responding party's list as accurate, the Board will find that the notice under section 8.1 is determinative of the application and it will be dismissed under section 8.1(5) paragraph 7. The rationale is set out in cases such as *Supply Chain Management Inc.*, [2000] OLRB Rep. March/April 397 and [2000] OLRB Rep. May/June 560 and the many other decisions cited in the applicant's submissions. I am unaware of any decision of the Board to the contrary.

30. In *Valemont*, the Board stated, at paragraph four:

> The Board also notes that the responding party gave notice under section 8.1 of the Act. The section was added to the Act precisely to deal with the prospect of a trade union applying for certification with less than 40% of the bargaining unit as members. If it does so, it cannot succeed in the application, even if it does win a representation vote (see *Renaissance Fallsview Hotel*, [1999] OLRB Rep. Dec. 1086). The statutory trade-off for that result is found in section 8.1(5) para. 7. That is, the application is

> dismissed under that section without triggering the mandatory bar in section 10(3). The responding party in this application chose to invoke the process under section 8.1. A dismissal with no automatic bar is the best end result an employer can achieve by invoking that process.

31. The Board does not accept Amacon's submission that only section 160(3) applies to this matter. The Board does not find that the differences between sections 160(1) and 10(1) and sections 160(3) and 10(3) result in only section 160(3) applying to this matter. Rather, section 160(3) states that it applies "if the Board dismisses an application for certification under this section". However, nothing in section 160 addresses the dismissal of an application, and the 2003 application was not dismissed under section 160. To the contrary, the January 24, 2007 decision makes it clear that the 2003 application was dismissed pursuant to paragraph 7 of section 8.1(5). Section 160 does not address the dismissal of an application under paragraph 7 of section 8.1(5). The Board finds that there is no conflict between section 160 and paragraph 7 of section 8.1(5). In the absence of a conflict, Section 126.1(2) states that paragraph 7 of section 8.1(5) and section 10(4) apply to the construction industry. As a result, no mandatory bar is imposed. As the cases cited above indicate, the Board has consistently applied section 10(4) rather than section 160(3) when a construction application that was filed under section 8 has been dismissed pursuant to paragraph 7 of section 8.1(5).

32. One last issue remains. The Board has a discretion under section 111(2)(k) to bar an unsuccessful applicant from filing a further application. However, the Board generally does not impose a discretionary bar when an application was dismissed pursuant to paragraph 7 of section 8.1(5). Such a bar was requested, but not granted, in *Valemont Homes*, *Custom Aluminum*, *Hussmann Canada* and *Supply Chain*.

33. In assessing whether a discretionary bar should be imposed in this case, the Board has primarily considered the relative prejudice to the affected parties. The Board finds that the employees will bear the greatest prejudice if a discretionary bar is imposed.

34. In January 2003, the employees expressed an interest in being represented by Local 183. Since then, the process has been stalled. In February 2006, the employees again expressed such an interest. If the Board were to impose a discretionary bar, the employees' right to seek to be represented would be further delayed. This is a substantial prejudice that should not be borne by the employees unless it is outweighed by a greater prejudice that will be experienced by either Local 183 or Amacon. In assessing these prejudices, it is relevant that the employees are not responsible for the way in which the 2003 application was, or was not, advanced by Local 183 and Amacon.

35. Amacon will not experience a greater prejudice if no discretionary bar is imposed. Amacon shared carriage of the 2003 application with Local 183. Amacon could have taken action raise the 2003 application as a bar 2006 application or could have withdrawn its section 8.1 notice at any time prior to December 29, 2006. However, it did not do so. Nothing that Local 183 or the employees did caused Amacon to not take such action. Also, even if Amacon had taken earlier action, it is questionable whether any bar would have been imposed. Accordingly, Amacon experiences no additional prejudice if no discretionary bar is imposed at this time.

36. Finally, the Board does not consider it necessary to impose a discretionary bar so as to deter circumstances such as this from arising in the future. This is a rare case. The 2003

application appears to have been forgotten. The Board discovered that it was still unresolved. The Board does not anticipate that circumstances such as this will arise very often in the future. In any event, in view of the prejudice the employees would experience, the Board does not consider it appropriate to impose a discretionary bar, for deterrence, or for any other reason.

37. Given that the Board is not imposing any bar, the Board does not need to consider the *Access Security* case.

38. The Board finds that section 111(3)(b) applies to this matter. Notwithstanding the fact that the May 1, and June 9, 2006 hearing dates have been held, the 2006 application has not yet been fully considered. Accordingly, for the purposes of section 111(3)(b) the Board finds that it will be considering that 2006 application after the final decision that has been issued on the 2003 application, and the 2006 application will be considered subject to that final decision in the 2003 application.

39. A somewhat similar fact situation was recently addressed in *K. J. Beamish Construction Services Ltd.*, dated January 17, 2007, Board file number 2701-98-R, as of yet unreported. However, in *K. J. Beamish* the section 8.1 notice had been withdrawn and the earlier application could not be dismissed pursuant to paragraph 7 of section 8.1(5). Accordingly, section 10(4) did not apply. In view of this and the different facts, the Board ruled that the union had abandoned its earlier application and imposed a bar under section 111(2)(k). The Board finds that the *K. J. Beamish* case is distinguishable.

40. Accordingly, as there is no mandatory bar and the Board does not impose a discretionary bar under these circumstances, this application will continue on the date scheduled by the Registrar.

3489-03-G Labourers' International Union of North America, Local 506, Applicant v. **Burling Ranger Company Inc., A Subsidiary of Burling Ranger Company Limited**, Responding Party.

Abandonment – Bargaining Rights – Construction Industry Grievance – Delay – Labourers 506 grieved that Burling Ranger had violated the provincial ICI agreement by failing to employ members of 506 or failing or refusing to subcontract work to subcontractors in contractual relations with the union – The Labourers relied on a collective agreement signed in 1970 by the applicant and Burling – The responding party argued that the union had abandoned its rights by failing to assert them as long ago as prior to the inception of provincial bargaining – The union served Burling with notice to bargain in the early 1970's, but the employer responded that it had no work in the geographic area – The Board heard evidence relating to subsequent work performed by Burling over an almost thirty-year period, without any assertions by the Labourers to rights under the collective agreement - Grievance dismissed

BEFORE: *Caroline Rowan*, Vice-Chair.

APPEARANCES: *Rob Gibson, Paul Hickey* and *Tony Neal* for the applicant; *Walter Thornton* and *Tom Farr* for the responding party.

DECISION OF THE BOARD: January 29, 2007

1. This is a referral of a grievance to the Board for determination under section 133 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act").

2. The grievance in issue is dated January 14, 2004 (the "Grievance") and was referred to the Board on February 4, 2004. In the Grievance, the applicant, Labourers' International Union of North America, Local 506, ("the union") alleges that the responding party, Burling Ranger Company Inc., A Subsidiary of Burling Ranger Company Limited, violated the Labourers' Provincial ICI Collective Agreement effective May 1, 2001 to April 30, 2004 (the "Provincial Agreement") by failing to employ members of the union to perform work within the exclusive jurisdiction of the union and/or by failing or refusing to subcontract work covered by the Provincial Agreement to subcontractors who are in contractual relations with the union. The Grievance refers to violations of the Provincial Agreement at 349 Muloch Drive in Newmarket ("Job Site 1") and 3291 Stouffville, Community Safety Village of York Region ("Job Site 2").

3. In support of its position that the responding party is bound to the Provincial Agreement, the applicant relies on a collective agreement between the applicant and Burling Ranger Company dated September 9, 1970 (the "Collective Agreement"). That agreement appears on its face to have been signed by Mr. Frank Burling, the owner of that Company at the relevant time who is now deceased, and Mr. Jenereaux, a representative of the union who is also now deceased. While the responding party does not concede that Mr. Burling signed the Collective Agreement on behalf of Burling Ranger Company, the parties agree that any bargaining rights held by the applicant in relation to Burling Ranger Company flow through to Burling Ranger Company Inc. (and to BR Ltd. referred to below) by virtue of the single employer and/or successor employer provisions of the Act. For ease of reference, the Board will therefore generally refer to all of these entities simply as the responding party or Burling.

4. In response to the Grievance, the responding party has raised a number of preliminary objections. The responding party firstly takes the position that the Board should dismiss the Grievance on the ground of delay because the responding party is prejudiced in its ability to defend against it as a consequence of the applicant's delay in asserting its alleged bargaining rights. The responding party secondly does not concede that the applicant has bargaining rights with Burling. In this respect, the responding party notes that the current principal of the responding party, Mr. Thomas Farr, who has worked at Burling since 1967, was entirely unaware of any such Collective Agreement ever having been signed by Mr. Frank Burling or of any claim by the applicant that it has bargaining rights with Burling. The responding party also contends that the applicant abandoned any such bargaining rights in the period prior to the advent of provincial bargaining on March 3, 1978. In support of this position, the responding party refers to the applicant's failure to assert bargaining rights in the period prior to provincial bargaining, that is, prior to March 3, 1978. The responding party also relies on the applicant's continued failure to assert its alleged bargaining rights in the period after provincial bargaining as evidence corroborative of the applicant's earlier abandonment and, in this regard, relies on the decision of the Board in *Marineland of Canada Inc.*, [1990] OLRB Rep. Dec. 1298.

5. The preliminary issues before the Board are therefore:

> 1) whether the Grievance should be dismissed for delay;
> 2) if not, whether the applicant has proven that it has bargaining rights with the responding party; and
> 3) if so, whether the responding party has established that the applicant abandoned those bargaining rights.

6. After the commencement of the hearing in this matter, the parties were able to reach agreement on documents to be entered as exhibits in this proceeding. They also agreed to stipulate the evidence that various witnesses would give if they took the stand and which the party opposite has no reason to dispute. The parties and their counsel are commended for their cooperation in this regard, which resulted in a considerable reduction in the number of hearing days required to complete this case.

Facts Relevant to the Preliminary Issues

7. The content of the agreement reached between the parties in this regard is set out as follows:

(O.L.R.B. File No. 3849-03-G)

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA,
LOCAL 506

("Applicant" or "Union" or "Local 506")

- and -

BURLING RANGER COMPANY INC.
A SUBSIDIARY OF BURLING RANGER

("Burling Ranger" or "Responding Party" or "Employer")

> The parties have reached agreement on documents that are to be entered as exhibits in this proceeding. Further the parties have agreed to stipulate that the following evidence of Tom Farr on behalf of Burling Ranger and Tony Neal and Paul Hickey on behalf of Local 506 is the evidence that the witness would give if they took the stand and that the party opposite has no reason to dispute that evidence.
>
> **A. Exhibits**
>
> The parties have agreed that the following documents are to be entered as Exhibits in this proceeding:
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> 1. Tabs 3 through 13 of the Union's Book of Documents.
> 2. Labourers Employer Bargaining Agency Designations.
> 3. 1978-1980 Labourers' Provincial Collective Agreement.

4. Application for Certification filed by Local 506 against Burling Ranger dated December 30, 2003.

5. Section 133 Grievance Referral filed by Local 506 in Dalton Engineering filed on January 22, 2004.

6. Section 133 referral filed by Local 506 against Van Bots on November 28, 2003.

7. Buttcon Grievance dated February 1996.

8. Employer's Book of Documents Tabs 2 through 6 (without prejudice to Union's position regarding Tab 2 and relevance (sic) jobs after advent of provincial bargaining listed in Tab 5).

9. Employer's Job Book for jobs from 1994-2001 (without prejudice to Union's arguments about relevance).

10. Affidavit of Diane Kruger, attached hereto as Appendix "A".

11. Grievance dated January 14, 2004.

12. 2001-2004 Provincial Agreement.

B. COLLECTIVE AGREEMENT

1. The collective agreement which the Union relies upon as giving rise to its bargaining rights with the Responding Party appears at Tab 3 of the Union's Book of Documents and on its face was entered into on September 9, 1970. On the face of the document the collective agreement was signed by C. Frank Burling on behalf of the Responding Party and Art Jenereaux on behalf of the Applicant.

2. The original of the collective agreement bearing the original signatures in ink was located in the original records of Local 506. That file had been misplaced but was recently discovered in 2003 by Paul Hickey who was a Business Representative of Local 506. The original of the collective agreement has been produced and inspected by the Responding Party and its counsel.

3. The Responding Party has no reason to challenge the authenticity of the collective agreement. There is no assertion that the collective agreement has been forged or is a fabrication.

4. The evidence of Tony Neal (in addition to that set out below) would be that the collective agreement was entered into in September 1970 and that the signature on behalf of the Union is that of Art Jenereaux. Mr. Neal's evidence would be that Art Jenereaux was the Business Representative who was responsible for looking after Simcoe County at the time the collective agreement was entered into and that he was very familiar with Mr. Jenereaux's signature. Mr. Neal's evidence would be that to his knowledge the signature on behalf of the Responding Party to

> be that (sic) of C. Frank Burling. Mr. Neal's evidence would also be that in the early 1970's he was aware, as a Business Representative of Local 506, that Art Jenereaux had entered into a collective agreement with Frank Burling and that Burling Ranger was thus bound to a collective agreement in the Simcoe County. The Responding Party has no reason to dispute the foregoing evidence of Tony Neal.

Paras. 5 and 6 deleted

7. The Union retained an expert in the field of Forensic Document Examination to provide an expert opinion as to whether the signature that appears on the collective agreement was authorized by the same name C. Frank Burling who signed the documents contained at Tab 5, 11, and 12 of the Union's Book of Documents. The expert evidence of Diane Kruger – as found in the attached Affidavit dated June 30, 2006 – is that is (sic) "highly probable" that the collective agreement was signed by the same "C. Frank Burling" who signed the documents at Tabs 5, 11 and 12 of the Union's Book of Documents.

C. EVIDENCE OF TOM FARR

8. The parties stipulate that the evidence already given by Tom Farr in the morning and up until the lunch break on the last day of hearing is his evidence and the Union has no reason to dispute it.

9. Burling Ranger Co. ("BR Co.") was established as a partnership involving among Mr. C. Frank Burling ("Frank Burling"), Mr. Floyd Burling ("Floyd Burling") and Mr. Bill Ranger ("Ranger") in or around 1950. In or around 1960, Floyd Burling departed the partnership, and in or around 1970 Bill Ranger left the partnership leaving Frank Burling as the owner/sole proprietor of the business. At that time, BR Co.'s address was 56 Roxborough Road in Newmarket, Ontario.

10. None of the current BR Ltd. principals (Tom and Jim Farr) were aware of any allegation that a collective agreement was signed on behalf of BR Co. until a copy of the alleged collective agreement was obtained from counsel for the Applicant on or about February 4, 2004.

11. Mr. Jim Farr ("Jim Farr") started as an employee of BR Co. in or around 1966. Mr. Tom Farr ("Tom Farr") started as an employee of BR Co. in or around 1967. In or around the spring of 1974, Jim Farr and Tom Farr became partners in BR Co.

12. A corporation named BR Ltd. was incorporated in or around the fall of 1975, and the assets and business of BR Co. were transferred to BR Ltd. Frank Burling, Tom Farr and Jim Farr were shareholders in BR Ltd.

13. Frank Burling sold his interest in BR Ltd. to Tom Farr and Jim Farr on or around February 1, 1977 and at the same time Frank Burling resigned as President of BR Ltd. In or around this time, the offices of BR Ltd. were relocated to 7351 RR 1, Thornton, Ontario.

14. Frank Burling died in or around 1995.

15. The current principals of the Responding Party have, in good faith attempted to investigate and inform themselves in relation to the grievance/referral including the documents and material facts relied upon by the Applicant:

a) The Responding Party does not have any material business records for any project(s) performed prior to 1994. The summary of Work Performed from 1970-Present included in the Document Book of the Responding Party ("the Document Book"), as amended to reflect work performed in Simcoe County in the period from 1970 until the advent of provincial bargaining, at Tab 5 was prepared based on what Jim and Tom Farr can remember in 2004, and not based on any business records. The inclusion of jobs in the period subsequent to the advent of provincial bargaining is without prejudice to the Applicant's position concerning the relevance of those jobs;

b) Tom Farr has had discussions with persons purporting to represent certain trade unions, particularly the Applicant and the "Bricklayers' Union", at jobsites of the Responding Party, in the 1990s, the 1980s and (perhaps) in the 1970s. These discussions were primarily, if not exclusively, conducted at job sites of the Responding Party and in relation to the fact that the Responding Party was a "non-union" company or business and that the persons purporting to represent the said trade unions wanted the Responding Party to sign voluntary recognition agreement or words to that effect;

c) The "Yellow Pages" excerpts included in the Document Book at Tab 3 simply establish that BR Co. and BR Ltd. were conducting business from 1970 until present.

16. The Employer has made its best efforts to locate any further documents but the documents listed above as well as those identified in paragraph 10 below is (sic) all that the Employer could locate.

17. On or about February 19, 1996 the Applicant filed a grievance against Buttcon Construction (included as a loose document in the Document Book) in relation to the subcontracting of work "*... to a Non-Union Sub-Contractor (Burley Ranger)...*" Tom Farr was/is able to recall that this grievance was brought to his attention (in or about February or March 1996) by Buttcon Construction. The Responding Party was recently able to locate or obtain a copy of the above-noted grievance documents.

18. In or around 1991, Burling Ranger Company Inc. ("BR Inc.") was incorporated with Tom Farr and Jim Farr as the sole shareholders. From that point forward, all construction activities have been undertaken by BR Inc., with BR Ltd. owning certain assets and not engaging in construction activities.

19. In or around 2001, the offices were moved to the current address of 3399, 9th Line, Innisfil, Ontario.

20. At all material times to the grievance/referral, BR Co., BR Inc. and/or BR Ltd. have regularly been engaged in the performance of masonry work in the industrial, commercial and institutional ("ICI") sector of the construction industry and have also occasionally performed masonry work in the residential sector of the construction industry.

21. Representatives of the Applicant and "the Bricklayers Union" met with Tom Farr and others, at the office of the Responding Party on or about December 28, 2003. The Documents contained at Tab 2 of the Employer's Book of Documents are the company's minutes of that meeting.

22. *Neither Jim Farr nor Tom Farr* have any knowledge of the notice to bargain or other documents provided to the Responding Party by the Applicant (in response to the request for particulars from the Responding Party) to establish an alleged collective bargaining relationship between the Applicant and BR Co. in the early and mid-1970s except those documents found in Burling Ranger files as described in paragraphs 8 and 9 above.

23. Tom Farr would say that BR Co., BR Inc. and BR Ltd. have regularly, actively and openly performed or been engaged to perform work falling within the ICI and/or residential sectors of the construction industry in the County of Simcoe from 1950 until the present, and particularly from 1970 to 1978. In addition, these corporations/businesses have performed work falling within the ICI and/or residential sectors of the construction industry in other parts of southern Ontario.

24. BR Co., BR Inc. and BR Ltd. have consistently performed the aforesaid construction work on a "non-union" basis/without regard to any bargaining rights or collective agreement binding on or applicable to the Applicant and represented itself as such, to the public and particularly to the construction industry (please see sample documents included at Tab 4 in the Document Book).

25. Throughout the 1970s, Burling Ranger had approximately 6-8 trucks used for business purposes. Each of these trucks prominently displayed Burling Ranger's name and phone number, and would be on job sites daily where Burling Ranger was performing work. Photos of the trucks are attached and would be proven by Tom Farr.

26. At all material times Burling Ranger has maintained a listing in the Newmarket Yellow Pages as an active masonry contractor (Document Book - Tab 3). The Phone number listed has at all times been the same and is that of Burling Ranger;

27. In addition, between October 1998 and August of 2001, Burling Ranger has placed several notices in the Daily Commercial News identifying substantial completion of certain projects when required by third parties. These have included announcements for work performed for the Bluewater District School Board, the Associated Hebrew Schools of Toronto, the York Region District School Board, IKEA Properties Limited and Bayview Country Club (Document Book - Tab 6).

28. Please see Exhibits 4, 5, 6, and 7. In addition, Tom Farr would say that in or around 1985 or 1986 the Responding Party performed work for Traugott Construction Limited ("Traugott") at a plaza development in Newmarket and/or the Markham area. This resulted in a grievance being filed by the Applicant or its representatives against Traugott for having subcontracted work to a non-union contractor, namely Burling Ranger.

29. Burling Ranger's business operates as a non-union company and has not attempted to develop any union clients.

C. EVIDENCE OF TONY NEAL [also spelled herein as "NEIL" and which latter spelling the Board believes to be correct]

30. Mr. Neal was a Business Representative for Local 506 from 1964 until 1987.

31. Throughout the 1960's and 1970's, Local 506 had 8 Field Representatives.

32. Local 506 did not have any Field Representative(s) assigned to Simcoe County until 1970, when Art Jenereaux, who was near retirement, was assigned to look after Simcoe County.

33. Subsequently Gill Craig was assigned to Simcoe County and from time-to-time through the 1970's, Tony Neal assisted Mr. Craig in respect of Simcoe County.

34. From the perspective of Local 506 and relative to Toronto, when Mr. Jenereaux was signed (sic), and throughout the 1970's, Simcoe County was under developed. There was not much construction going on. Jobs were sparse and Local 506 had few contractors performing bargaining unit work in Simcoe County.

35. The Representative signed (sic) to Simcoe County would attend at union job sites (when the general contractor was unionized) to enforce the collective agreement and to meet with members of Local 506.

36. Local 506 has never had an office or location in Simcoe County and never more than 1 Representative assigned to Simcoe County. Moreover, since the 1970's, the Representative assigned to Simcoe County has also been responsible for looking after Toronto and assisting with work in Board Area No. 8.

37. Mr. Neil can identify the documents at 3-13 of the Applicant's Book of Documents, and can identify Art Jenereaux's signature on the collective agreement (at tab 3).

38. Mr. Neil will state that the Local 506 collective agreement at tab 3 of the Applicant's Book of Documents was the standard masonry for Simcoe County at that time.

39. The Notices to Bargain (tabs 4, 6, 7, 8) were in the files of Local 506 and were sent to the company, at or about the dates indicated, including the document at tab 8, sent by Tony Neal.

40. When Local 506 received the 1972 response letter (tab 5) from Burling Ranger, it would have accepted it as being sent in good faith and relied on Burling Ranger to advise when it had work in Simcoe County.

41. Local 506 would have accepted the letter (tab 5) as credible because there was not a lot of construction work in Simcoe County at the time, from the perspective of Local 506 in relation to the rest of Local 506's geographic territory.

42. Mr. Neil did not encounter Burling Ranger on any job sites in Simcoe County after March 1971, until, at least, the advent of Provincial Bargaining and is not aware of anyone else at Local 506 encountering Burling Ranger at any job site.

43. From the list of jobs in Burling Ranger's Book of Documents, the Company worked on non-union sites where Local 506 Representatives would not be patrolling or present until, at least, the advent of Provincial Bargaining.

44. Given the 1971 letter (Applicant's Book of Documents – tab 5) Local 506 would not have been patrolling for Burling Ranger in any event.

> 45. Mr. Neal recalls encountering Burling Ranger in Board Area No. 8 in the 1970's. On one occasion this was to talk to workers about signing union cards, but he did not receive any assistance or cooperation.
>
> 46. To Mr. Neal's knowledge, Burling Ranger was not working in Simcoe County in the 1970's, but rather seemed to work in Board Area No.8 where the union had no bargaining rights (until Provincial Bargaining commenced). This statement is subject to submissions in relation to the issue of abandonment.
>
> 47. In 1978 the Minister of Labour designated the Labourer's Employer and Employee Bargaining Agencies.
>
> 48. The first Provincial Collective Agreement was effective from 1978 to 1980. [Affidavit and *Curriculum Vitae* of Diane Kruger omitted].

8. The documentary evidence filed in this proceeding includes evidence of various earlier Board proceedings involving Burling. The first such proceeding is an accreditation application filed by The General Contractors' Section of the Toronto Construction Association in 1971 as the bargaining agent for a unit of employers for whom the applicant herein holds bargaining rights in Board Area 8. The application did not relate to Simcoe County. In its response to the application, the union incorrectly included Burling on its list of contractors for whom the union had bargaining rights, even though its bargaining rights for the responding party related only to Simcoe County. The Schedules to the union's response to the accreditation application were entered into evidence. While those Schedules are undated, it seems likely that the union's response (to which these Schedules were attached) was filed with the Board in or about 1972 at or around the same time that Burling filed its intervention.

9. Burling responded to having been identified as potentially affected by the accreditation application by letter dated March 20, 1972 from Mr. Burling. His letter states that the application for accreditation does not relate to Burling, since the union has bargaining rights for Burling's labourers in the County of Simcoe only and the application for accreditation does not include the County of Simcoe. Burling's intervention to the application to this same effect is dated April 17, 1972. The Board issued its final decision in the accreditation application on February 18, 1975. That decision confirms that Burling is not an employer affected by the accreditation application.

10. The next proceeding involving Burling relates to events occurring in 1985 or 1986. As noted in the undisputed facts set out above, in or around 1985 or 1986, Burling performed work for Traugott Construction Limited ("Traugott") at a plaza development in Newmarket and/or the Markham area. This resulted in a grievance being filed by the Applicant or its representatives against Traugott for having subcontracted work to a non-union contractor, namely Burling.

11. Burling was also referred to in a grievance dated February 19, 1996 against Buttcon Construction ("Buttcon"), which grievance was referred to the Board in or around that time. In it, the union grieves that Buttcon has been contracting or subcontracting work to a non-union contractor (Burley Ranger), at the project located at Sutton Public School. The union specifically indicates in that grievance that Burling is not in contractual relations with the union.

12. The union also filed a grievance against Vanbots Construction Corporation ("Vanbots") that was referred to the Board on December 18, 2003, and another grievance against Dalton Engineering and Construction Co. Ltd. ("Dalton") that was referred to the Board on or about February 3, 2004 concerning work subcontracted to Burling. The details of the grievance against Vanbots set out in Schedule "A" to the grievance referral were not filed with the Board in this proceeding. The Board however understands from the parties' submissions that the issue in that grievance referral is similar to that raised in the grievance referral against Dalton. In that latter grievance referral, the union complains about Dalton's decision to subcontract work at one of its job sites to Burling Ranger Company Inc., a company which the union asserts is not in contractual relations with it. The union also notes in that grievance referral that "this grievance is filed without prejudice to any position the Union may take in any other or future proceeding concerning the issue of whether Burling Ranger Company Inc. is bound to the Provincial Collective Agreement."

13. On December 30, 2003, the union filed a certification application in respect of all construction labourers in the employ of Burling Ranger Company Inc. a subsidiary of Burling-Ranger Company Limited in the industrial, commercial and institutional ("ICI") sector of the construction industry in the Province of Ontario and in all other sectors in Board Area 18 (which includes the County of Simcoe). In its application, the union notes its understanding that Burling-Ranger Company Inc. is a wholly owned subsidiary of Burling-Ranger Company Limited and that all of the construction employees of both companies are employed by the named Responding Party. The union indicates in its application that it reserves its right to rely on s.1(4) of the Act after reviewing any response. The union also states that this certification application is made without prejudice to any position that the union may take that the responding party is already bound to a collective agreement relationship with the union by virtue of the operation of section 69 and/or 1(4) of the Act or otherwise because of the operation of the Act.

14. Finally, the documentary evidence before the Board includes Burling's minutes of a meeting held in or about December 2003 between representatives of Burling, of the applicant as well as of another trade union. The stated purpose of that meeting was to have Burling sign a voluntary recognition agreement. Burling submits that the discussions between the parties at that meeting are inconsistent with the applicant already having bargaining rights for Burling. The union however objects to any reliance on discussions at that meeting since it takes the position that that meeting was a settlement meeting.

Decision

15. For the reasons that follow, the Board finds that the responding party has established that the applicant abandoned any bargaining rights it may have had with the responding party by virtue of the Collective Agreement alleged to have been entered into in 1970. In the circumstances, it is unnecessary to decide conclusively whether the applicant has proven on a balance of probabilities that Mr. Frank Burling, who is now deceased, signed the Collective Agreement on behalf of Burling or whether the present grievance should in any event be dismissed for delay due to the prejudice now faced by the responding party in defending against it.

(i) Principles Applicable to a Finding of Abandonment

16. It is well-established that a trade union can abandon its bargaining rights. In *John Entwistle Construction Limited*, [1979] OLRB Rep. March 211, the Board explained the underlying rationale for this and the factors relevant to a finding of abandonment at paragraph 10 and 11, as follows:

> 10. The principle of abandonment of bargaining rights has been established for many years in the Board's jurisprudence. This principle finds expression in the expectation that a trade union, once it acquires bargaining rights by certification or voluntary recognition, actively will promote those rights. Conversely, failure to use the rights may result in the trade union's loss of them. See the Board's decision in *J.S. Mechanical*, Board File No. 1677-78-R (as yet unreported) at paragraph 4 for a comprehensive outline of Board cases dealing with this principle.
>
> 11. The issue of whether a trade union has abandoned its bargaining rights must be determined on the particular facts of each case. The Board has looked to a variety of factors in the bargaining relationship as indicators of whether bargaining rights have been abandoned. Some of these are canvassed in paragraph 5 of J.S. Mechanical, supra and include: the length of the union's inactivity; whether it has made attempts to negotiate a collective agreement or sought to administer an existing collective agreement; whether terms and conditions of employement (sic) have been changed by the employer without objection from the bargaining agent; and whether there are any extenuating circumstances which might explain an apparent failure to assert bargaining rights.

A trade union will therefore be taken to have voluntarily abandoned its bargaining rights where it does not actively promote those rights. A determination of whether or not a trade union abandoned its bargaining rights in any given case is a question of fact to be determined having regard to all of the circumstances.

17. It is common ground that the responding party in this case bears the onus of establishing that abandonment has occurred. The presumption that trade unions do not voluntarily abandon bargaining rights must be overcome by establishing evidence to support a finding of abandonment. As noted in *Ellis-Don v. Ontario (Labour Relations Board)*, [1995] O.J. No. 3924 Ontario Court of Justice (General Division) Divisional Court, at paragraph 32, the unlikely possibility of a trade union "intending" to give up its bargaining rights "…is reflected in the Board's jurisprudence that requires unequivocal evidence that a trade union has "slept on its rights": See *Lorne's Electric*, [1987] OLRB Rep. Nov. 1405; *The Hudson's Bay Company*, [1993] OLRB Rep. June 563; and *Toronto Dominion Bank*, [1995] OLRB Rep. May 686. (sic)"

18. While the responding party refers to the difficulty it faces in establishing that the union abandoned its bargaining rights in the period that predates provincial bargaining given the passage of between twenty-five and thirty years, this is not unusual in cases in which abandonment is alleged. In assessing the necessary evidence, the Board takes account of the fact that the allegations often relate to events that occurred long ago and that reasonable inferences may need to be drawn from the available evidence. The Board in *G.S. Wark Ltd.*, [1996] OLRB Rep. September/October 811, at paragraph 21, qualified the test as follows at paragraph 13:

> 12. Notwithstanding the language used in some Board decisions, we respectfully suggest that it is inaccurate to say that "clear and cogent" evidence is required to establish abandonment, at least in the sense suggested by Local 1. First of all, the Board's factual determinations are always made on the balance of probabilities, while "clear and cogent", as argued by Local 1, suggests some higher test. Second, a common feature of abandonment cases is a less than satisfactory evidentiary foundation. It is not unusual, as in the case herein, for abandonment cases to deal with long periods of time for which there is little documentary evidence and where witnesses are either unavailable or have a very poor recollection of events. Many abandonment cases have to be determined on the basis of inferences drawn from bits of documentary or other evidence which is available. Accordingly, what constitutes evidence of abandonment, and what evidence is sufficient to rebut the presumption against abandonment, will depend on the circumstances. Further, since the operative presumption is clearly rebuttable, the onus can shift to the trade union to establish its conduct (as it does when it comes to a consideration of automatic collective agreement renewal clauses, for example – see below).

Evidence must therefore be presented from which a reasonable inference can be drawn that, on a balance of probabilities, the trade union abandoned its bargaining rights despite the presumption that trade unions do not generally intend to do so.

19. The evidence required to rebut the presumption often involves evidence that the trade union concerned either knew, or reasonably ought to have known, about the fact that the employer regularly performed bargaining unit work on a non-union basis. The nature and quality of the evidence required to meet the onus is described as follows in *Toronto Dominion Bank*, [1995] OLRB Rep. May 686 at paragraph 65, as follows:

> 65. In cases of abandonment the Board must start with the proposition that the union holds bargaining rights. ... The focus then turns to whether there is compelling evidence that the union abandoned the rights it attained. That evidence could take any number of forms. The clearest form of evidence for example would be a written communication from the trade union to the employer that it no longer wished to represent the employees for whom it holds bargaining rights. In other instances, the evidence might be such that, notwithstanding that fact that there is not an express representation to that effect, the *conduct* or *affirmative actions* taken by the trade union are such that a reasonable inference can be drawn that the union abandoned its bargaining rights. Typically this is shown through evidence that the employer consistently performed work on a non-union basis, *and* the trade union knew or reasonably ought to have known of that fact. In either circumstance however the onus is on the employer which asserts abandonment to present clear and unambiguous evidence from which the Board can conclude or draw a reasonable inference that the trade union abandoned bargaining rights. The onus is not on the trade union to assert that it has affirmatively exercised its bargaining rights or has not abandoned them. Rather, unequivocal evidence which either points to actual abandonment or from which a reasonable inference can be drawn is required.

As such, a party that asserts that a trade union's bargaining rights have been abandoned must present clear evidence from which a reasonable inference can be drawn that a trade union abandoned its bargaining rights. The party alleging abandonment must put forward evidence suggesting that the union either voluntarily gave up its bargaining rights or "slept on its rights" by failing to promote or exercise them.

20. Where the party alleging abandonment calls sufficient evidence to rebut the presumption, the onus will shift to the union to explain its conduct. (*G.S. Wark Ltd., supra*). For example, as noted in *R. Reusse Co. Ltd.*, [1988] OLRB Rep. May 523 at paragraph 13, "… as a general rule, the Board has regard to a second automatic renewal of a collective agreement but thereafter the onus is on the union to satisfy the Board that its bargaining rights have not been abandoned by showing its interest in maintaining those rights through contact with the employer party to the agreement: *The Belleville and District Builders' Exchange, supra*; *Cooksville Steel Limited, supra*; *Pinkerton's of Canada Limited, supra*. Absent evidence that the union actively pursued its bargaining rights, the Board has held the union has "slept on those rights" and must be taken to have abandoned those rights: *Elgin Construction, supra*; *Mattagami Construction, supra*; *Catalytic Enterprises, supra*; *John Entwistle Construction Limited, supra*; *York Finch General Hospital*, supra."

21. The responding party acknowledges that it is difficult to establish abandonment of provincial bargaining rights in the ICI sector given the way that bargaining rights are held in that sector and the fact that the Board will consider the conduct of all affiliated bargaining agents in assessing whether there has been abandonment. (See for example, *G.S. Wark Ltd., supra* and *C.S.B.I. Contracting Ltd.*, [2000] O.L.R.D. No. 98, Board File No. 3851-98-G (January 21, 2000)). The responding party in the present case however points to the evidence that it continued to operate as a non-union contractor performing work within the jurisdiction of the applicant for a further period of approximately twenty-six years after March 3, 1978 before the present grievance was filed as corroborative of the fact that the union abandoned its bargaining rights *prior to* March 1978. As noted by the Board in *Marineland of Canada Inc., supra*, evidence of post-provincial bargaining conduct may be relevant to a determination of whether bargaining rights were, in fact, abandoned prior to the introduction of provincial bargaining.

22. The Board accepts as appropriate the approach taken in *Marineland of Canada Inc., supra*, of considering what occurred in the period after provincial bargaining to assess whether the conduct of the applicant in that period is consistent or inconsistent with an earlier abandonment of bargaining rights. In this respect, the Board cannot agree with the applicant's suggestion that it is not helpful to look at later events in order to divine what was intended in the earlier period. As noted, an assessment of whether abandonment has occurred in a given case depends on the particular facts and it is sensible to consider all of the surrounding circumstances to determine if, on a balance of probabilities, the evidence discloses that the union gave up its bargaining rights.

23. The Board also rejects the applicant's contention that the approach taken in *Marineland of Canada Inc., supra*, is inconsistent with the Board's jurisprudence set out in *C.S.B.I. Contracting Ltd., supra* regarding the necessary elements to a finding of abandonment in the ICI sector in the period following provincial bargaining. The applicant argued that the Board had to consider the conduct of all of the other affiliated bargaining agents in the period after

provincial bargaining, since otherwise the applicant's conduct in the post-provincial bargaining period is being used to eradicate bargaining rights of the other locals.

24. In the Board's view, however, there is no need to require evidence that all of the affiliated bargaining agents intended to give up their bargaining rights in that later period in order to assess whether the applicant's conduct is consistent or inconsistent with an earlier abandonment of its bargaining rights. If the evidence reveals an earlier abandonment then no bargaining rights flowed through to the other locals at the time that provincial bargaining rights came into effect. There would not therefore be any bargaining rights in the other locals to eradicate. The Board therefore accepts that the evidence concerning what occurred after March 3, 1978, including whether the union sought to enforce its bargaining rights in that later period, can and should be considered to assess whether that evidence corroborates evidence of an earlier abandonment by the union.

(ii) Overview of the Evidence

25. In the present case, Burling presented uncontradicted evidence indicating that it performed bargaining unit work in Simcoe County on a regular basis throughout the 1970's and in the more than twenty-year period thereafter without comment or complaint from the union. In the Board's view, a reasonable inference can be drawn from Mr. Farr's evidence that the listing of jobs performed in the 1970's in the period prior to provincial bargaining is not entirely complete given the passage of between twenty-five to thirty years and the fact that the responding party no longer has job records dating back that far. It therefore seems likely that the evidence presented concerning the bargaining unit work performed by the responding party on a non-union basis prior to the advent of provincial bargaining in March 1978 is, in fact, a conservative estimate of the amount of work performed during this period.

26. The responding party also presented evidence to the effect that, in the period after provincial bargaining in March 1978, it continued to perform bargaining unit work on a regular basis for in excess of twenty years and the applicant did not seek to enforce any bargaining rights. The applicant concedes that, after March 1978, there was ongoing activity by the responding party and non-enforcement by the union.

(iii) The Period Prior to Provincial Bargaining

27. The facts relevant to the issue of abandonment commence on or about September 9, 1970 when the responding party allegedly entered into the Collective Agreement. As noted, the Board assumes without deciding for the present purposes that the applicant has established that Mr. Frank Burling did, in fact, sign the Collective Agreement on behalf of the responding party and that the responding party was consequently bound to it at or around that time. The scope of the bargaining unit in the Collective Agreement includes all masonry tenders performing work within the County of Simcoe. The term of the Collective Agreement is from September 7, 1970 until April 30, 1971 and is subject to automatic one-year renewals unless notice of termination or proposed revision is given thirty days prior to its expiry.

28. On or about February 15, 1971, the union's business manager, Mr. R. Ford, gave notice to bargain to the responding party. The documentary evidence before the Board indicates

that Mr. Frank Burling responded to this notice by sending a letter to the applicant dated March 26, 1971, the content of which states as follows:

> Thank you for your notice to bargain. We regret to say that due to economic conditions and our Toronto Area orientated high wage rates, we appear to be unable to obtain any work in the County of Simcoe.
>
> In view of the above we suggest that the Agreement has taken on a theoretical rather than practical value. A renegotiation, therefore, would merely consume time with no practical benefit to be gained.
>
> Our suggestion would be to advise you if at any time we should again obtain work in the County of Simcoe.

According to Mr. Neil, who was a business representative for the applicant from 1964 to 1987, the applicant would have accepted this letter as having been sent in good faith and would have relied upon the responding party to advise it when it had work in Simcoe County. The applicant would further have accepted this letter as credible given that there was not a lot of construction work in Simcoe County at the time relative to the rest of the applicant's geographic territory which includes Toronto.

29. There is no evidence before the Board indicating that the responding party ever contacted the applicant thereafter to advise that it had obtained work in Simcoe County. There is also no evidence indicating that the responding party did not do so. Given the unavailability of Mr. Burling and of some of the union's representatives responsible for the bargaining unit back in the 1970s, there is simply no available evidence on this issue.

30. It is however clear that the applicant continued to send notices to bargain to the responding party after, and notwithstanding, Mr. Burling's letter dated March 26, 1971. The union did so by letter from Mr. Ford dated February 25, 1972 and again one year later, by letter from Mr. Ford dated February 28, 1973. According to the evidence, the last notice to bargain from the union to the responding party was given by letter dated January 28, 1974 from Mr. A. Neil, the union's business representative who provided evidence in this proceeding.

31. It is perhaps possible to infer that the union relied on Mr. Burling's letter dated March 26, 1971 in not pursuing bargaining in 1973, given the handwritten notation stating "not active 3-26-71" beside the name "Burling Ranger Co." on a post office registration receipt contained in the union's files and appended to the February 28, 1973 notice to bargain. Regardless of the reasons, however, the Board accepts that the evidence indicates that the union continued to assert its bargaining rights in respect of employees of Burling up until January 28, 1974 when Mr. Neil again sent notice to bargain to Burling.

32. The Board however rejects the applicant's suggestion that the evidence reveals an ongoing assertion of bargaining rights by the applicant until February 18, 1975 when the Board issued its decision in the accreditation application filed by The General Contractors' Section of the Toronto Construction Association in 1971. The fact that the Board's decision in this matter issued on February 18, 1975 in respect of an accreditation application filed in respect of Board Area 8 does not amount to an on-going assertion by the union of its bargaining rights for Burling in the *County of Simcoe* up to the date of the Board's decision. The evidence before the Board, in

fact, suggests that the union took no steps to assert or promote its bargaining rights for Burling in Simcoe County in the period after Mr. Neil sent Burling a fresh notice to bargain on January 28, 1974.

33. The union argues that its inactivity can be explained by Mr. Burling's letter to the union of March 26, 1971 and that Burling is precluded from asserting abandonment of bargaining rights in light of that letter. In this regard, the union refers to the principles of estoppel, the requirement that a party seeking equitable relief have "clean hands", and the principle that a party cannot rely on its own misconduct to seek a benefit, and relies on the following cases: *DNM Steel Ltd.* 2003 CanLII 34875 (ON L.R.B.); *Ellis Don Limited,* [1992] O.L.R.D. No. 695, Board File No. 2526-89-G (February 28, 1992). *Whitney Maintenance Limited,* [1973] OLRB Rep. January 26; *Re Lennox & Addington Community Mental Health Services and S.E.I.U., Loc. 663 (1995),* 51 L.A.C. (4th) 28; *Four Twenty-Seven Investments Ltd. (Trustee of) v. Ryan,* [1988] O.J. No. 244, *Petro-Canada v. 366084 Ontario Ltd.,* [1995] O.J. No. 3994 and *Alcan Aluminium Ltd.,* [1997] OLRB Rep. May/June 305. In support of its position that the March 26, 1971 letter amounts to a deliberate misrepresentation, the union notes Mr. Farr's evidence at paragraph 23 of the statement of uncontradicted facts to the effect that Burling has "regularly, actively and openly performed or been engaged to perform work" from 1950 to present and particularly from 1970 to 1978.

34. It is not however, in the Board's view, reasonable to infer from the evidence before it that Mr. Burling's statement in his letter of March 26, 1971 to the union to the effect that Burling was unable to obtain work in the County of Simcoe was a misrepresentation at the time it was made. The evidence before the Board does not reveal what work, if any, Burling was doing in Simcoe County in March, 1971 or what prospects for future work Burling had in Simcoe County at the time the letter was written. In addition, according to Mr. Neil, that representation was on its face credible because there was not a lot of construction work in the County of Simcoe relative to Toronto at the time the letter was written. It is further unreasonable to expect that Mr. Farr could now remember more than thirty years later precisely what the job prospects were at the time that letter was written. In the Board's view, the evidence falls short of establishing wrongdoing on Mr. Burling's part when he sent the March 26, 1971 letter.

35. In addition, the evidence does not suggest that the union relied on the representations in that letter to place bargaining on hold indefinitely. Mr. Burling's letter of March 26, 1971 is a response to the union's proposal to bargain in 1971 and indicates that bargaining at that time has no practical value. The fact that the union proposed bargaining again in 1972, in 1973 and again in 1974 suggests that the union was not relying on the representations made in that 1971 letter when it failed to pursue bargaining in the period after 1972. In addition, even though Mr. Neil is available to testify and did provide evidence in this proceeding, no explanation was offered as to why the union did not pursue bargaining after he sent notice to bargain to Burling in 1974. In all the circumstances, the Board does not accept that the existence of the March 26, 1971 letter precludes the responding party from asserting abandonment.

36. At the time that Mr. Neil gave notice to bargain to the responding party in 1974, the Collective Agreement had either expired or had been the subject of several automatic renewals and would arguably have been subject to four additional renewals prior to the advent of provincial bargaining in 1978. In the circumstances, the onus shifts to the union to satisfy the Board that its bargaining rights were not abandoned during the period after 1974. As noted, there is no satisfactory explanation as to why Mr. Neil did not follow up with the notice to bargain he

sent on January 28, 1974. (While this could have been related to the fact that the union misplaced the file containing the original of the Collective Agreement until it was found in 2003, there is no evidence before the Board concerning when that file was actually misplaced. As such, this explanation is entirely speculative.)

37. From January 1974 to March 1978, the responding party performed at least twelve jobs of varying sizes involving bargaining unit work: four jobs listed for 1974; four listed for 1975; none listed in 1976; and four listed in 1977. The Board has not included in this number any of the jobs listed as having been performed in the late 1970's or in 1978 since the evidence does not establish whether they were performed before or after March, 1978. As noted, eight of the twelve jobs listed were performed in the period from 1975 to the end of 1977. All of these jobs were performed for non-union general contractors using several labourers employed directly by Burling and some of the jobs, including those performed between 1975 and 1977, are relatively large jobs with an approximate value of over $100,000 of labour/material.

38. The uncontradicted evidence of Mr. Farr also indicates that throughout the 1970's, the responding party had approximately six to eight trucks used for business purposes that prominently displayed Burling's name and phone number and that those trucks would be on job sites daily where Burling was performing work. Even though Burling moved offices in or around 1977, it maintained a listing in the Newmarket Yellow Pages as an active masonry contractor and at all material times the phone number listed has been the same.

39. The situation in the present case is therefore distinguishable from that before the Board in *J & D Display & Interiors Ltd.*, [1998] OLRB Rep. March/April 217, in which the evidence established that between the acquisition of bargaining rights on December 2, 1976 and March 3, 1978, there were only three jobs performed by J & D that would have been covered by the trade union's collective agreement. In these circumstances, the Board concluded that such a relatively small amount of employer activity over such a short period does not lead to the conclusion that the local union intended to or did abandon its bargaining rights. In the circumstances, the Board found that the local union's failure to contact J & D after the project on which bargaining rights were acquired finished is reflective of inattention, not abandonment.

40. While the Board agrees that a trade union is not expected to be aware of every instance in which a unionized contractor performs bargaining unit work, the evidence in the present case suggests that, to the extent that the union was not aware of Burling's on-going construction activities in the County of Simcoe in the period prior to provincial bargaining in 1978, the reason for that was the union's decision to police its collective agreements in that geographic area only at work sites where the general contractor was unionized (see paragraph 35 of the statement of facts). While this decision is perhaps understandable given the relatively few jobs in that geographic jurisdiction and the union's lack of resources at the time, the union must nonetheless accept the consequences of its decision to direct its resources elsewhere.

41. In the Board's view, the union ought reasonably to have been aware of Burling's ongoing construction activities in the County of Simcoe in the period prior to March 1978, including Burling's on-going construction activities at various non-union sites in the period from 1974 to 1978. Even if the Board were to accept (which as noted above it does not) that the relevant time period commences only from February 18, 1975 to March 3, 1978, the Board is, in any event, satisfied that the union ought reasonably to have been aware of Burling's continued

work in the County of Simcoe during that three year period had it made any effort to enforce the Collective Agreement.

42. The situation in the present case is similar to that before the Board in *Hugh Murray Limited*, [1979] OLRB Rep. July 664 in that there was a period from May 1974, when the Company was sold, until the advent of provincial bargaining in 1978, during which there was no bargaining and no assertion of bargaining rights. Shortly after the advent of provincial bargaining in November 24, 1978, the trade union applied to the Board for a declaration that Hugh Murray was bound to the terms of the provincial agreement. The Board however concluded that the trade union had given up its bargaining rights prior to March 1978 since the trade union had not pursued bargaining after 1974 and acted as though it did not have bargaining rights for the company's employees.

43. The Board's decision in that case was upheld by the Divisional Court in a decision that also dealt with a judicial review application of another Board decision where abandonment was found. In upholding the Board's decisions, the Divisional Court in *Re Carpenters' District Council of Lake Ontario and Hugh Murray (1974) Ltd. et al. and Re Labourers' International Union of North America, Local 527 et al. and John Entwistle Construction Ltd. et al. (1980)*, 33 O.R. (2d) 670 at p. 678 made the following observations:

> It is perfectly clear that the Union is attempting in each of these cases to score a fluky advantage in the application of the 1977 amendments to the Labour Relations Act, respecting Province-wide agreements in the industrial sector of the construction industry. Having scarcely seen the employees whom they purport to represent for at least four years, the Unions now seek to have their bargaining rights revived without evidence of any effort on their parts, except their applications to the Board and the applications to this Court.
>
> If the Board's decisions were quashed, the effect in these cases would be that the employees of Murray (1974) and Entwistle would be saddled for the balance of the current provincial agreement with bargaining agents who have done nothing for them for the past four years or more.

Similarly in the present case, the union did not engage in bargaining and did not assert its bargaining rights for a period of approximately four years from 1974 to 1978 and now seeks to establish provincial bargaining rights by virtue of the statutory scheme that came into effect in 1978.

44. The situation in the present case is also, to some extent, similar to that before the Board in *Twin City Plumbing and Heating and Groff Plumbing and Heating Limited* [1982] OLRB Rep. April 631. In that case, the trade union concerned was certified to represent a unit of plumbers and steamfitters of Twin City, following which the union provided notice to bargain and held two negotiation meetings. No collective agreement was however reached and no further negotiations or meetings took place between Twin City and the union after the end of 1974. The union did not further make any effort to enforce its bargaining rights in that period. In these circumstances, the Board found that the trade union had abandoned its rights prior to the coming into force of provincial bargaining when the trade union let a period of three years lapse from 1975 to 1978 (when provincial bargaining came into effect) without making any attempt to negotiate a collective agreement.

45. The facts in the present case further differ from those before the Board in *Hudson's Bay Company (The)*, [1993] OLRB Rep. June 563 and in *G.S. Wark Ltd.*, [1996] OLRB Rep. September/October 811 relied upon by the applicant. In *Hudson's Bay Company (The), supra*, from 1975 until the advent of provincial bargaining in 1978 when no further negotiations were entered into between the trade union and the Company, projects contracted out went to union contractors and to carpenters that were referred from the hiring hall. As such, in that case, unlike in the present one, there was no evidence of any construction activity in the applicable geographic area against which the trade union's rights could be asserted.

46. Similarly, in *G.S. Wark Ltd., supra*, Wark, unlike Burling, subcontracted all or substantially all of the bargaining unit work in question to employers with whom the trade union had a collective agreement in the period prior to provincial bargaining. In these circumstances, the Board was unable to infer simply because it was "possible" that some bargaining unit work was subcontracted non-union that that had, in fact, occurred or that any significant amount of work was subcontracted to non-union employers. In that case, the Board noted that there was nothing in Wark's conduct prior to 1979 that would suggest to the trade union concerned that Wark did not consider itself bound by the collective agreement with the trade union. In addition, the agreed facts before the Board in that case specifically indicated that the union did not intend to abandon its bargaining rights. At paragraph 22 of the decision, the Board remarked that this fact represented a unique feature of the case:

> This case does present an unusual feature in that we are unaware of any previous case in which an employer alleging abandonment agreed, as Wark has agreed in this case, that the union did not intend to abandon its bargaining rights. While not determinative, this is an important consideration, and forms the factual backdrop against which the rest of the facts must be assessed and inferences drawn.

In the present case, however, there is not only no agreement between the parties to the effect that the union did not intend to abandon its bargaining rights, the evidence suggests that in the period from 1974 to 1978 (and indeed earlier) Burling performed all of its bargaining unit work on a non-union basis. As such, unlike the situation in *G.S. Wark Ltd., supra*, all of Burling's conduct in the period from 1974 to 1978 suggests that it did not consider itself bound by any agreement with the union.

47. On the evidence before it, and given the open manner in which Burling was performing its activities on a non-union basis, the Board concludes that the union slept on its bargaining rights for employees of the responding party in the period prior to provincial bargaining.

(iv) The Period after Post-Provincial Bargaining

48. The evidence before the Board concerning the union's continued lack of enforcement of its bargaining rights in the period after March, 1978 for a period of in excess of twenty years further corroborates this finding of abandonment. Mr. Farr's evidence makes clear that, during the 1980's and the 1990's, representatives of the applicant were aware that Burling was operating as a "non-union" company or business. There is further no evidence that the union sought to enforce bargaining rights in respect of Burling's employees until the present grievance was filed in 2004.

49. In all the circumstances, the Board does not find it necessary to infer further proof of abandonment from the fact that the applicant filed a grievance in the mid-1980's against Traugott for work having been subcontracted to a non-union contractor, namely Burling, and a similar grievance against Buttcon in 1996. The Board also need not consider the union's grievances filed against Dalton and Vanbots in or about 2003 and 2004, the union's certification application filed against Burling in December of 2003 or the discussions between Mr. Farr and others at a meeting with representatives of the applicant and of "the Bricklayers Union" on or about December 28, 2003 (which discussions the union in any event asserts are privileged). While it is unnecessary to rely on these grievances as further proof of an earlier abandonment, the Board notes that the positions taken by the union, particularly in the earlier grievances, are consistent with the Board's finding of abandonment having regard to the other evidence led.

50. The Board cannot further accept the union's contention that its alternative positions set out in the certification application filed in 2003 and the union's statements to a similar effect made in 2003 and 2004 in connection with the Dalton and Vanbots' grievances renders equivocal whether the union abandoned its bargaining rights in the pre-provincial bargaining period. These alternative positions indicating that the union may assert the existence of bargaining rights in respect of employees of Burling, the basis of which is far from clear, is not, in the Board's view, sufficient to detract from so many years of on-going bargaining unit work performed by Burling on a non-union basis and non-enforcement by the union.

51. The circumstances before the Board therefore differ from those in Toronto Dominion Bank, [1995] OLRB Rep. May 686, in which the vast majority of the bargaining unit work performed by the Bank was done either by unionized contractors or by the Bank's own "union" forces. By "union" forces, the Board refers to the fact that the Bank's employees were union members who were paid union rates and benefits and that the Bank made remittances on their behalf to the local union even though the Bank may not have considered itself bound to any collective agreement. As such, in that case, the Board found that the evidence before it was insufficient to support the drawing of an inference that the trade union reasonably ought to have known of the work that was performed non-union.

52. In addition, in *Toronto Dominion Bank, supra,* unlike in the present case, the contention was that the trade union had abandoned its bargaining rights in the period after provincial bargaining. In that case, the Bank argued that, in the period after June 6, 1978, and therefore after the advent of provincial bargaining, the union had abandoned its bargaining rights by its failure to enforce the collective agreement obligations notwithstanding that the Bank openly engaged in construction activities using both union and non-union contractors in the period from 1978 to 1992. By contrast, in this case, the contention is that the union abandoned its bargaining rights in the period *prior to* provincial bargaining.

53. In the Board's view, the facts in the present case point even more clearly to an abandonment of bargaining rights than did those in *Hugh Murray Limited, supra,* referred to above given the corroborating evidence of the union's conduct in the post-provincial bargaining period involving a further period of between twenty-five and thirty years, during which the union failed to assert any bargaining rights for labourers employed by Burling. As such, in the present case, the effect of finding that bargaining rights continue to exist would mean that employees of Burling would be subject to the current provincial agreement with a union that has done nothing for them for in excess of thirty years.

Disposition

54. For all these reasons, the Board concludes that the evidence before it discloses that, in the period prior to provincial bargaining in 1978, the union abandoned any bargaining rights it may have had with Burling as a consequence of the Collective Agreement allegedly signed in 1970. Given that this was the basis on which the union asserted that Burling is bound to the Provincial Agreement, this grievance must be dismissed.

0170-04-R; 0171-04-R; 0924-04-R; 1800-04-R; 2934-04-R; 4185-04-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. **Canform Structures Limited**, Responding Party v. Electrical Power Systems Construction Association, Intervenor; **Eastern Construction Company Limited**, Responding Party v. Electrical Power Systems Construction Association, Intervenor; The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Applicant v. **Canform Structures Limited**, Responding Party v. Electrical Power Systems Construction Association, Intervenor No. 1 v. Labourers' International Union of North America, Ontario Provincial District Council, Intervenor No. 2; **Ellis-Don Corporation**, Responding Party v. Electrical Power Systems Construction Association, Intervenor; ssociation ("EPSCA"), Intervenor.

Bargaining Rights – Bargaining Unit – Certification – Collective Agreement – Construction Industry – In these six applications for certification, the issues were: (i) whether the Employers were bound by the EPSCA Agreement on the application date; (ii) whether the applications ought to be dismissed for a lack of labour relations purpose and (iii) the appropriate bargaining unit – The Employers were not members of EPSCA – When bidding for work tendered by Ontario Power Generation (OPG), the Employers must accept a "Labour Requirements Clause" (LRC) which obliged the Employers to abide by the EPSCA Agreement – The Board held that the Employers were not bound by the EPSCA Agreement because (a) the Employers had neither entered into voluntary recognition agreements with the Unions nor authorized EPSCA or OPG to be their agent by virtue of the LRC; (b) the LRC did not establish a direct connection between the Employers and the Unions party to the EPSCA Agreement; (c) contacting the Unions' hiring halls for employees did not constitute a voluntary recognition agreement, and (d) section 57 of the *Act* had no application as the Employers were not members of EPSCA – The Board refused the Employers' request to dismiss the applications for certifications as the Board found the *Act* did not confer on it the discretion to dismiss or refuse to entertain timely applications for certification, even if the applications are devoid of labour relations purpose – The Unions' request for a province-wide bargaining unit was rejected; rather, the appropriate bargaining unit was the Unions' trade or craft in all sectors of the construction industry other than the ICI sector in the Board Areas in which employees were working on the application date – Certificates issued in two; the others referred to Manager of Field Services

BEFORE: *Harry Freedman*, Vice-Chair.

APPEARANCES: *Lorne A. Richmond* and *H. Bartlett* for Labourers' International Union of North America, Ontario Provincial District Council; *Doug Wray* and *Rick Harkness* for Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America; *David Cowling* for the responding parties; *M. Patrick Moran* and *Max Jackson* for Electrical Power Systems Construction Association

DECISION OF THE BOARD: February 2, 2007

1. Four of these six applications for certification (Board File Nos. 0170-04-R, 0171-04-R, 0924-04-R and 1800-04-R) had been scheduled for hearing by notice of hearing issued by the Registrar on November 17, 2006 after having been adjourned pursuant to paragraph 14 of the decision of the Board (comprised of Messrs. Pickell, Haward and me) dated October 26, 2004. The Chair of the Board had authorized me to sit alone to hear and determine these matters pursuant to section 110(14)(a) of the *Labour Relations Act, 1995*, c. 1, as am. (the "Act") despite paragraph 15 of that October 26th decision in which we noted we were seized with these matters. When the hearing convened, none of the parties objected to these matters proceeding before me sitting alone.

2. The Board in its October 26, 2004 decision noted the three responding parties in those four applications (the applications in Board File Nos. 2934-04-R and 4185-04-R were not before that panel of the Board at that time) were taking no position with respect to whether they were bound by the collective agreement between the Electrical Power Systems Construction Association ("EPSCA") and the Power Council of Unions in effect at the time the applications were filed (the "EPSCA Agreement"). The Board recorded that their counsel "did not accept that the trade unions acquired bargaining rights for the employees of his clients merely because they applied the terms and conditions of the EPSCA collective agreements".

3. When the hearing convened, the parties agreed the applications in Board File Nos. 2934-04-R and 4185-04-R should also be dealt with at the same time as those four applications despite the decision dated April 25, 2005 adjourning them *sine die* pending the disposition of the application in Board File No. 0171-04-R. As a result of the parties' agreement, the two applications in Board File Nos. 2934-04-R and 4185-04-R were placed before me for determination together with the four applications that had been listed earlier for hearing.

4. The common issue in these six applications is whether the responding parties were bound by the EPSCA Agreement at the time these applications were filed. If the responding parties were bound by that collective agreement, the parties agreed that the applicants held bargaining rights for their employees and the bargaining unit in these applications would be the same as the bargaining units the Board determined were appropriate in the related applications in Board File No. 3448-04-R et al (Ontario Power Generation Inc. et al) by decision dated August 22, 2005 (*Ontario Power Generation Inc.*, [2005] OLRB Rep. July/Aug. 675) as clarified by the Board's decision dated January 16, 2007. If the responding parties were not bound by the EPSCA Agreement, the appropriate bargaining unit would be based on section 158(2) of the Act where no incumbent union holds bargaining rights. In addition, if the responding parties were not bound by the EPSCA Agreement, the responding parties also submit these applications should be dismissed as a matter of the Board's discretion under the Act because certifying the applicants for a bargaining unit that does not adopt the bargaining unit in the EPSCA Agreement would disrupt a stable labour relations system that had been in place for more than 30 years.

5. The applicants and the responding parties together take the position the responding parties are not members of EPSCA and the responding parties were therefore not bound by the EPSCA Agreement. They both acknowledged the responding parties had abided by all of the terms and conditions of that collective agreement whenever they did work encompassed by the scope of that collective agreement (major construction work performed on what was at one time the property of Ontario Hydro) but the responding parties had not signed a recognition agreement or pick up agreement with the applicants in respect of the work they performed on the property of Ontario Hydro. The responding parties and the applicants contend the applicants do not hold bargaining rights for employees of the responding parties under the EPSCA Agreement because they are not bound by that collective agreement; they merely abide by and apply its terms when they engage in work encompassed by that collective agreement.

6. EPSCA takes a contrary view. It claims the responding parties are in fact bound to its collective agreement with the Power Council of Unions and that these applications seek to displace the two members of the Power Council with which the applicants are affiliated as the responding parties' employees' bargaining agents.

7. I note parenthetically neither the responding parties nor the applicants challenged the status of EPSCA to participate in these six applications. The Board in *T. A. Andre & Sons (Ontario) Limited*, unreported, Board File No. 2134-04- R, decision dated October 19, 2004, Q.L. cite [2004] OLRD No. 4042; application for reconsideration dismissed, decision dated January 11, 2005, Q.L. cite [2005] O.L.R.D. No. 292, dismissed a request by EPSCA to reconsider the Board's earlier decision dated September 30, 2004 in which it found that T.A. Andre & Sons (Ontario) Limited was not bound by the EPSCA collective agreement. EPSCA had sought to intervene in that application but had not filed a timely intervention. The Board in its October 19, 2004 decision dismissed EPSCA's request for reconsideration and intervention, not on the basis of timeliness, but on the following grounds:

> EPSCA's right to intervene is undermined if neither of the necessary parties, that is the applicant and the employer, assert that they are bound to the EPSCA agreement. Moreover, EPSCA has not placed facts before the Board that would cause us to conclude that the employer is bound. Consequently, we conclude that there is no basis for EPSCA's intervention.

As there was no objection to EPSCA making the argument that the responding parties were, in fact, bound by the EPSCA collective agreement with the Power Council of Unions at the time these applications were filed, I received and have considered the submissions of EPSCA.

8. EPSCA does not point to either certificates issued to the applicants or voluntary recognition agreements signed by the responding parties to support its position that the responding parties were bound by the EPSCA Agreement. It also acknowledges that the responding parties were not members of EPSCA and there is therefore no statutory basis for finding the responding parties are bound by that collective agreement. Rather, it argues the language of the EPSCA Agreement taken together with the "Labour Requirements Clause" and the responding parties' signed acceptance of their obligations under the Labour Requirements Clause establish a contractual and enforceable basis for finding the responding parties are bound by the EPSCA Agreement and that the applicants hold bargaining rights for the employees of the responding parties when performing work coming within the bargaining unit described in that collective agreement.

9. EPSCA referred to the recitals in its agreement with the Power Council of Unions in support of its argument:

> WHEREAS EPSCA is an Association formed to represent Employers in collective bargaining and on their behalf enter into collective agreements covering those of their employees in the bargaining unit as hereinafter defined;
>
> AND WHEREAS the Council is formed to represent the Unions listed in Article 2 in collective bargaining with EPSCA and to enter into collective agreements on their behalf and on behalf of their members in the bargaining unit as hereinafter defined;
>
> AND WHEREAS it is the desire of the parties to conclude an agreement with a new concept designed to bring stability, harmony, and an effective method to amicably resolve problems in the electrical power systems sector of the construction industry, in the Province of Ontario;

EPSCA points out the first recital does not limit the employers it represents to only its members. Rather, it contends the employers it represents are defined by whether their employees are performing work in the bargaining unit described in the collective agreement. The third recital also suggests that the scheme envisioned by EPSCA is a "new concept" that need not be rooted in the statute. Underlying the EPSCA arrangement is an understanding that all employers who perform construction work on what was once Ontario Hydro property, whether or not their employees are represented by a union that is a member of the Power Council of Unions when doing work that is not encompassed by the EPSCA Agreement, must use only members of the trade unions EPSCA has recognized and must comply with the EPSCA Agreement. In other words, a non-union contractor may successfully bid on work covered by the EPSCA Agreement, but must use members of the applicants and comply with the EPSCA Agreement when doing that work.

10. The definitions and bargaining unit description set out in Article 1 of the EPSCA Agreement establish the foundation for EPSCA arguing employers that are not its members are nevertheless bound by the EPSCA Agreement and as a result the applicants hold the bargaining rights for employees of those employers when they are engaged in work covered by that collective agreement. The relevant sections of Article 1 provide:

> 1.1 EPSCA recognizes the Council as the exclusive bargaining agency for a bargaining unit comprising employees as defined in Section 1.4… engaged in all construction industry work… performed in the Province of Ontario on Ontario Power Generation Inc. (OPGI) and Hydro One property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities.
>
> For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50 kV), transmission stations, microwave and repeater stations.

> 1.2 The Work described in Section 1.1 shall also include work on property acquired by Ontario Power Generation Inc. (OPGI) and Hydro One for:
>
> (a) the supply of aggregate and concrete used in the construction of said facilities;
>
> and
>
> (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI) AND Hydro One for the storage of materials to be used on a Project by Employers.
>
> 1.3 The Council recognizes EPSCA as the exclusive bargaining representative for all Employers in respect of work performed by their respective employees in the bargaining unit set forth in Section 1.1.
>
> 1.4 The term "employee" shall include all employees of the Employers in the classifications set out in the trade appendices provided in Article 4, Sections 4.1 and 4.2, save and except those described hereunder....
>
> 1.6 The term "Employers" shall include individual members of EPSCA and any company, partnership, sole proprietorship, joint venture, contractor, subcontractor or any person that is bound by the terms and conditions of this Agreement.

The term "Employer" defined by section 1.6 of the EPSCA Agreement specifically includes both members of EPSCA and entities that are not members of EPSCA but that are bound "by the terms and conditions of this Agreement". The term "employee" is defined in section 1.4 by reference to the employees of the Employers in the classifications set out in the trade appendices. The trade appendices are established by Article 4 which provides in section 4.1:

> 4.1 The trade appendix applicable to each member Union of the Council will contain those provisions which are not common to all member Unions of the Council, and those provisions will apply to appropriate members of each International Union as provided in its appendix while they are working under the terms of this Collective Agreement. Such appendices shall be deemed to be part of this Agreement.

Article 2 of the EPSCA Agreement defines the members of the Council. It states:

> 2.1 It is recognized that the Council comprises certain International Unions whose names are listed hereunder:
>
> International Union of Operating Engineers
> Laborers' [sic] International Union of North America
> United Brotherhood of Carpenters and Joiners of America
>
> 2.2 Individual Unions of the Council shall be hereinafter called the "Union".

If employees are engaged in work described in Article 1, they are covered by the EPSCA Agreement and their employer must therefore be an employer within the meaning of section 1.4, EPSCA submits.

11. Article 3 establishes the form of the EPSCA Agreement, dividing it up between a master portion and appendices. Article 3 provides:

> 3.1 This Agreement shall consist of a master portion which shall apply to employees and to foremen who work for Employers while such employees and foremen are engaged in work as described in Article 1, Recognition. There shall be one appendix negotiated by and for each member Union of the Council and one appendix for foremen. The appendices shall apply province-wide.

Since the agreement applies to employees while they are engaged in work encompassed by the EPSCA Agreement, their employer must therefore be an employer that is required to apply the terms and conditions of that collective agreement and is, according to EPSCA, bound by it.

12. EPSCA points to the "Labour Requirements Clause" that is a part of every construction tender or contract issued by Ontario Power Generation Inc. for any construction work to be done on what was once Ontario Hydro property. The relevant elements of the Labour Requirements Clause provide:

> **A** For the purpose of this Labour Requirements Clause, the following definitions shall apply:
>
> 1. **"Company"** shall mean any company, partnership, sole proprietorship, joint venture, contractor, subcontractor or person contracting to do the whole or any part of the work contemplated by this tendering document or contract, as the case may be, at the site described in this tendering document or contract, as the case may be.
>
> 2. **"EPSCA Agreement"** shall mean any collective agreement in existence now or in the future between the Electrical Power Systems Construction Association and any Trade Union or Council of Trade Unions....
>
> 5. **"Work on Site"** shall mean work performed by any Company for Ontario Power Generation Inc. in the Province of Ontario on property acquired by Ontario Power Generation Inc. for:
>
> (a) the construction of generation facilities or microwave and repeater stations;
>
> (b) the supply of aggregate and concrete used in the construction of said facilities; and
>
> (c) ancillary material yards.
>
> **B** Any company performing any ... Work on Site which would come within the jurisdiction of any of the Unions that are signatory to an

> EPSCA Agreement shall be required to conform to and adhere to the provisions of that EPSCA Agreement....
>
> **J** If any Company subcontracts to any other Company any part of the Work on Site contemplated by this contract, it shall require any such Company to conform to and adhere to all terms and conditions contained in this Labour Requirements Clause and all such subcontracts shall incorporate all terms and conditions contained in this Labour Requirements Clause....
>
> **O** Any Company contracting or contracted to perform Work on Site contemplated by this contract shall give to Ontario Power Generation Inc. immediately upon request evidence satisfactory to Ontario Power Generation Inc. of such Company's compliance with any or all of the terms and conditions contained in this Labour Requirements Clause. Failure to do so, or failure to comply with any of the terms and conditions contained in this Labour Requirements Clause shall, at the option of Ontario Power Generation Inc., render this contract or such part of it as is determined by Ontario Power Generation Inc., null and void....

EPSCA also relies on the Acknowledgment of Labour Requirements signed by every employer doing construction work on what was once Ontario Hydro property. That acknowledgment document provides:

> ACKNOWLEDGEMENT OF LABOUR REQUIREMENTS
>
> [Name of Company] (hereinafter called the "Company") acknowledges and agrees that should its tender...be accepted by Ontario Power Generation Inc.:
>
> (a) the contract with Ontario Power Generation Inc. resulting from that acceptance shall include all the terms and conditions of the Labour Requirements Clause set out in the tendering documents.
>
> (b) all the terms and conditions of the Labour Requirements Clause shall form part of any subcontract which the Company enters into for the performance of any work covered by such contract with Ontario Power Generation Inc.;
>
> (c) failure by the Company or any of its subcontractors to comply with any of the terms and conditions contained in the Labour Requirements Clause shall, at the option of Ontario Power Generation Inc., render such contract or any such subcontract, or any part of such contract or any such subcontract as determined by Ontario Power Generation Inc., null and void.
>
> The Company shall give to Ontario Power Generation Inc. upon request evidence satisfactory to Ontario Power Generation Inc. that it and any of its subcontractors are complying with the terms and conditions of the Labour Requirements Clause. It is understood that this Acknowledgement of Labour Requirements shall form part of the Company's contract with Ontario Power Generation Inc. if its tender is accepted.

EPSCA emphasizes that the acknowledgment of labour requirements signed by employers doing work encompassed by the EPSCA Agreement together with the obligations spelled out in the Labour Requirements Clause establish that each employer must "conform to and adhere to" the EPSCA Agreement. EPSCA argues a consequence of employers agreeing to those contractual obligations is them becoming "bound by the terms and conditions of" the EPSCA Agreement as contemplated by section 1.6 of that collective agreement. Thus, such employers are "Employers" within the meaning of section 1.6 of the EPSCA Agreement and are therefore the employers whom the applicants recognize EPSCA represents pursuant to section 1.3 of that collective agreement.

13. EPSCA points out there is no need for a statutory foundation to establish the responding parties are bound by the EPSCA Agreement as the agreement is clearly enforceable at the behest of the applicants in accordance with its terms. Employers like the responding parties, by agreeing to be bound by the terms and conditions of the EPSCA Agreement, have agreed through the operation of sections 1.6, 1.3, 1.1 and the first recital of that collective agreement to have EPSCA represent them in collective bargaining with the applicants.

14. EPSCA accepts and agrees with the Board's analysis of a virtually identical issue in *Comstock Canada Ltd.*, [2006] OLRB Rep. July/August 501 (July 6, 2006) in which the Board found that Labourers' International Union of North America, Ontario Provincial District Council and Comstock Canada Ltd. ("Comstock") were not bound by the collective agreement between Brighton Beach Ltd. and the Labourers' International Union of North America ("Labourers"). EPSCA submits the Board's decision in *Comstock Canada Ltd.* establishes the principle that the parties to the collective agreement must clearly agree the other employers that are required to abide by the terms and conditions of that collective agreement have accepted they are also bound by that agreement. EPSCA contends that its collective agreement contains provisions which establish that agreement. It suggests language of the EPSCA Agreement is analogous to the language found in the Carpenters' and Millwrights' agreements with Brighton Beach rather than the Labourers' agreement. The Board found that Comstock was not bound by the Labourers' collective agreement with Brighton Beach but accepted Comstock's position, on the agreement of Brighton Beach, the Carpenters and the Millwrights, that Comstock was bound by the collective agreement between the Carpenters and Brighton Beach and the collective agreement between the Millwrights and Brighton Beach.

15. The Board in *Comstock Canada Ltd.* made the following observation at page 506 in respect of the Labourers' collective agreement with Brighton Beach:

> There was no suggestion by the parties in this proceeding that the intervenor or the responding party notified the applicant that the responding party had agreed to be bound by the Brighton Beach Agreement or that the applicant had accepted that the responding party was bound by that agreement. Indeed, the following comments made by the Board in *Kvaerner Jaddco*, [1999] OLRB Rep. Nov./Dec. 1023 at page 1030 are particularly apt:
>
> > Two parties are not capable of binding a third party contractor (and its employees) by a document to which that third party contractor is a stranger. *Further, it would be a strange agreement which enabled the contractor to become bound to a collective agreement in circumstances of which the union might have no notice at all.* [emphasis added]

> There was no obligation under the Brighton Beach Agreement for contractors to become bound by that agreement nor was there any obligation to advise the applicant that contractors had signed an acknowledgement document in which they agree with the intervenor that they agree "to abide by and be bound under the Collective Agreement above noted." Thus, there is no agreement in writing between the applicant and the responding party that could constitute a collective agreement.

EPSCA submitted that although it did not notify the applicants when it obtained an Acknowledgement of Labour Requirements from contractors, the applicants were in fact aware of the identify of the employers becoming bound by the EPSCA Agreement because those employers were required by article 13 of the EPSCA Agreement to contact the applicants to secure employees to carry out the work covered by that collective agreement.

16. Article 13 of the EPSCA Agreement provides, in part:

> 13.2 An office will be established by EPSCA, or the Employer with the approval of EPSCA, for each Major Project and the Construction and Services Division. A purpose of this office will be to co-ordinate employment as specified in this Article.
>
> 13.3 EPCSA, or the Employer with the approval of EPSCA, and the Council will exchange the names of their representatives in each of the areas described in 13.1(a), who will be responsible for co-operating in the referral and employment of reliable and competent union members.
>
> 13.4 EPSCA, or the Employer with the approval of EPSCA, will notify the appropriate Unions of future manpower requirements for all employees coming within the scope of this Agreement.
>
> 13.5 Where key tradesmen are required, Employers reserve the right to employ and transfer key tradesmen to effectively utilize their special skills, having regard for the special requirements of thermal, nuclear or hydraulic generation projects and transmission and transformation construction.
>
> The employment of key tradesmen and tradesmen employed through the Employment Request Article will be negotiated between EPSCA and the Union for each trade and will be contained in the trade appendices.
>
> 13.6 The employment of additional tradesmen and apprentices, excluding key tradesmen and tradesmen employed through the Employment Request Article, shall be carried out on the following basis and sequence:
>
> (a) The EPSCA office, or the Employer with the approval of EPSCA, will request the appropriate local union office for tradesmen and apprentices required. The request will include a description of the work, the number of qualified tradesmen

> and apprentices required, and the name of the Employer for whom the tradesmen and apprentices will be working....

EPSCA contends the applicants received notice of the employers that become bound by that collective agreement through the operation of Article 13 of the EPSCA Agreement.

17. Finally, EPSCA points out the applicants have, by virtue of section 1.3 of the EPSCA Agreement, authorized EPSCA to act on their behalf or act as their agent for the purpose of having employers becoming bound by the EPSCA Agreement. The applicants, by recognizing EPSCA as the bargaining agent of employers who have employees doing the work encompassed by the EPSCA Agreement, have in effect authorized EPSCA to determine on their behalf the employers that will become bound by the EPSCA Agreement.

18. The applicants and the responding parties take a different view of the Labour Requirements Clause and the Acknowledgement of Labour Requirements signed by the responding parties. They say those are commercial contractual obligations that do not confer bargaining rights on the applicants. They argue that trade unions obtain bargaining rights for the employees of employers either through voluntary recognition agreements or certification. The mere fact that an employer is required to apply the terms and conditions of a collective agreement, or has agreed to abide by and comply with its the terms and conditions does not, absent some specific agreement with the trade union party to that agreement, confer bargaining rights on the trade union.

19. The Board observed in *Ecodyne Limited*, [1979] OLRB Rep. July 629 at page 636:

> The mere fact that the terms of a collective agreement are applied to certain work and to certain employees does not, however, mean that the union party to the collective agreement has actual bargaining rights for the employees involved.

In *T. A. Andre & Sons (Ontario) Limited*, unreported, Board File No. 2134-04- R, decision dated September 27, 2004, the Board wrote:

> Of course, being required to apply the EPSCA agreement does not mean that a trade union hold bargaining rights.

Also see *Comstock Canada Ltd., supra*, at page 507.

20. The responding parties and the applicants submit the commercial contractual obligation to apply, comply with or abide by the terms and conditions of a collective agreement is analogous to a "cross-over clause" in a collective agreement. While an employer subject to a cross-over clause in its "home" collective agreement is required to apply the terms and conditions of the collective agreement referred to in the cross-over clause when working within the scope of that latter collective agreement, applying or abiding by that latter collective agreement does not confer bargaining rights under it. In *Fernbrook Homes Ltd.*, unreported, Board File No. 2778-05-R, decision dated February 3, 2006, Q.L. cite [2006] OLRD No. 401 the Board made the following comment about the effect of cross-over clauses at paragraph 35:

> ...the Board has confirmed that the "plugging in" to other collective agreements referred to in the above passage is not a matter of extending bargaining rights, but rather of incorporating the terms and conditions of other collective agreements when certain work is performed. Cross-over clauses do not create bargaining rights. They simply define terms and conditions of employment in the event that the employees in the bargaining unit covered by the collective agreement perform work outside the scope of the work for which terms and conditions of employment are prescribed in the collective agreement, and within the scope of other collective agreements to which the UWU is a party: (see *C.D.C. Contracting*, [1982] OLRB Rep. Nov. 1589, *Elirpa Construction and Materials Limited*, [1994] OLRB Rep. July 838; *The Residential Low Rise Forming Contractors Association of Metropolitan Toronto and Vicinity*, [1995] OLRB Rep. Dec. 1471).

A similar view was expressed earlier by the Board in *LaFarge Canada Inc.*, unreported, Board File No. 4003-98-G, decision dated May 27, 1999, Q.L. cite [1999] OLRD No. 1793 at paragraph 24:

> The cross-over clauses of the collective agreements do not confer bargaining rights upon the union. They prescribe terms and conditions of employment, but not bargaining rights.

The responding parties also point to *Runnymede Development Corporation Limited*, [1987] OLRB Rep. Oct. 1305 in which the Board made the following observation about cross-over clauses in collective agreements at page 1313:

> The Board has held that although, as a general matter, such provisions operate to incorporate into the collective agreement in which they are found some of the terms and conditions of the collective agreement(s) to which they refer, they do not operate to bind an employer to the referenced collective agreement(s) as though it is a party thereto (see *Frank Plastina Investments Ltd.*, [1986] OLRB Rep. June 720; *Sandercock Construction (1976) Ltd.*, [1984] OLRB Rep. April 653; *C.D.C. Contracting*, [1982] OLRB Rep. Nov. 1589).

21. The responding parties rely on and adopt the analysis the Board used in *Comstock Canada Ltd., supra* and contend there is no material difference between the situation before the Board in that case and the circumstances of these applications. They point out there was nothing in writing between them and the applicants by which they agreed to recognize the applicants as the bargaining agents of their employees. While they agreed to abide by and comply with the EPSCA Agreement, they did not join EPSCA nor did they give any authority to EPSCA to recognize the applicants as the bargaining agents of their employees. They did nothing to confer bargaining rights on the applicants. There is nothing between the responding parties and the applicants that would constitute a recognition agreement or a collective agreement. The responding parties say they merely agreed to abide by and comply with the terms of the EPSCA Agreement without becoming bound by it, in the same way Comstock applied the terms and conditions of the Labourers' collective agreement with Brighton Beach.

22. They go on to argue that other than collective agreements made pursuant to an accreditation order or industrial, commercial and institutional sector provincial agreements, a collective agreement must be evidenced by an agreement in writing between an employer and a

trade union in order for it to be binding on them and confer bargaining rights on the union. The only exception to that requirement is found in section 57 of the Act, which provides for a collective agreement between an employers' organization and trade union to be binding on the employer members of that organization "as if it was made between each of such persons and the trade union." Section 57(1) of the Act provides, in part:

> A collective agreement between an employers' organization and a trade union or council of trade unions is, subject to and for the purposes of this Act, binding upon the employers' organization and each person who was a member of the employers' organization at the time the agreement was entered into and on whose behalf the employers' organization bargained with the trade union or council of trade unions as if it was made between each of such persons and the trade union or council of trade unions and upon the employees in the bargaining unit defined in the agreement….

Since it was agreed the responding parties are not members of EPSCA, section 57 of the Act has no application. The responding parties contend it is irrelevant what the EPSCA Agreement says because no matter what the commercial contractual arrangement is between EPSCA, Ontario Power Generation Inc. and the responding parties, the applicants do not have bargaining rights for the employees of the responding parties and the responding parties have not recognized the applicants as bargaining agents for their employees because there is no direct relationship between them.

23. The applicants emphasize they have no control over the Acknowledgement of Labour Requirements documents employers are required by Ontario Power Generation Inc. to sign. They point out it is up to Ontario Power Generation Inc., and not them, to ensure compliance with the Labour Requirements Clause and the EPSCA Agreement. While Ontario Power Generation Inc. is in a position, by virtue of its economic power as a significant purchaser of construction services, to compel employers that violate the EPSCA Agreement to accept they are bound by the EPSCA Agreement for purposes of the Act when the applicants bring proceedings under the Act against employers for alleged violations of the EPSCA Agreement, the applicants do not have a legal or statutory foundation for that argument. They say they have to rely on Ontario Power Generation Inc. to ensure compliance with the EPSCA Agreement.

24. It is clear that under the Act, there are, as the applicants point out, three ways a trade union can obtain bargaining rights with an employer: through a collective agreement, through a voluntary recognition agreement or by certification. Bargaining rights are not created by virtue of unilaterally complying with and abiding by the terms of a collective agreement.

25. The Labour Requirements Clause and the Acknowledgement of Labour Requirements signed by the employers doing work under the EPSCA Agreement do establish that the employers engaged in that work must comply with and abide by the terms and conditions of that collective agreement. Nevertheless, there is nothing in writing between the responding parties and the applicants or their agents that creates bargaining rights. In my view, the EPSCA Agreement did not confer bargaining rights on the applicants because it was not, for purposes of the Act, binding on employers who were not members of EPSCA. Those non-member employers had not entered into recognition agreements directly with the applicants, and their execution of the Acknowledgement of Labour Requirements did not, it seems to me, authorize EPSCA to be their agent since the Acknowledgement of Labour Requirements was secured by Ontario Power

Generation Inc., not by or on behalf of EPSCA. Moreover, even if section 1.3 of the EPSCA Agreement might be construed as an authorization of EPSCA to secure voluntary recognition agreements on behalf of the applicants from the responding parties, there was nothing to suggest the applicants authorized members of EPSCA or Ontario Power Generation Inc. to act as their agent for that purpose.

26. There is no doubt every employer that performs work coming within the scope of the EPSCA Agreement must comply with and abide by the terms of that collective agreement. But there is nothing in the Labour Requirements Clause or the Acknowledgement of Labour Requirements that establishes a direct connection between the employers that sign the acknowledgement and the trade union parties to the EPSCA Agreement. I do not accept EPSCA's argument that it or Ontario Power Generation Inc. is the agent of the applicants for purposes of securing voluntary recognition from the responding parties. Furthermore, I am not persuaded that contacting the applicants' hiring halls for employees establishes the existence of a voluntary recognition agreement.

27. Section 57 of the Act establishes the basis for finding a collective agreement between an employers' organization and a trade union is binding on employers who are not themselves signatory to that collective agreement. Unless an employer is a member of the employers' organization (or is on the list of names provided to the union by the employers' organization of the employers for which the employers' organization is bargaining), the collective agreement between the employers' organization is not, for purposes of the Act, binding on that employer.

28. A trade union must be in a position to enforce any collective agreement by which it and an employer are bound. The unions bound by the EPSCA Agreement can enforce that agreement against EPSCA and the members of EPSCA by virtue of section 57 of the Act since the EPSCA Agreement is binding on those EPSCA members as if it had been made between each of them and the union parties to the agreement. As the applicants do not have that statutory foundation for claiming a collective bargaining relationship with employers that are not members of EPSCA, the applicants are not, it seems to me, in a position to seek enforcement of the EPSCA Agreement under the Act in respect of the responding parties because they are not members of EPSCA. The applicants are, at best, third parties to the commercial contractual relationship between Ontario Power Generation Inc. and those non-member employers and must therefore rely on Ontario Power Generation Inc. to compel those employers to abide by the EPSCA Agreement.

29. In the result I am not persuaded the applicants and the responding parties were bound by the EPSCA Agreement for purposes of the Act at the time these applications were filed.

30. The responding parties submitted that if the Board found they were not bound by the EPSCA Agreement, these applications should be dismissed because they undermine the long standing stable labour relations structure that exists in the electrical power systems sector. During the course of argument, counsel acknowledged that his argument was premised on the Board having an overriding discretion to refuse to proceed with any application, including applications for certification pursuant to section 114(1) of the Act.

31. Section 114(1) of the Act provides:

> The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

The Board in *Ontario Power Generation Inc.*, [2005] OLRB Rep. May/June 464 (May 30, 2005) addressed a somewhat similar policy argument made by the affected employers and EPSCA at page 467:

> In our view, if a timely application for certification is made by a trade union and the Act does not otherwise bar that application, then the Board does not have a general discretion to refuse to entertain it. Sections 7(9), 111(2)(k) and 111(3)(c) of the Act do give the Board the discretion to refuse to consider or entertain an application for certification in certain limited circumstances. None of the circumstances that would permit the Board to refuse to deal with a certification application exist in these applications. Thus, despite the difficulties and upheavals to a stable labour relations structure the responding parties say would result by permitting a trade union to apply for certification to displace itself as a bargaining agent, the Board does not have the authority under the Act to dismiss an application for certification only because the applicant union already holds bargaining rights for the employees in the bargaining unit for which it seeks certification.

The Board did not, in that decision, expressly deal with section 114(1) of the Act. In my view, there is nothing in section 114(1) that confers on Board the sort of discretion the responding parties suggest the Board has to dismiss or refuse to deal with applications for certification that are otherwise timely and within the Board's jurisdiction. In view of the Act's express provisions which give the Board the discretion to grant, order a representation vote, dismiss or refuse to entertain an application for certification in certain specific circumstances (see sections 7(9), 11(2), 111(2)(k), 111(3)(k) and 128.1(13) of the Act) and the explicit discretion to dismiss or refuse to inquire into other kinds of applications, (see sections 96 and 166 of the Act) I believe the Board does not possess some overriding general discretion under sections 114(1) of the Act to dismiss an application for certification even if the Board were persuaded that no useful purpose or labour relations objectives would be served by proceeding with the application.

32. The parties agreed upon the description of the appropriate bargaining unit in the event the Board had found the responding parties were bound by the EPSCA Agreement. They also made submissions about the description of the appropriate bargaining unit if the Board came to the conclusion the responding parties were not bound by that collective agreement.

33. These applications were all made under section 158(2) of the Act which provides:

> Despite subsection 128 (1), a trade union represented by an employee bargaining agency may bring an application for certification in relation to a unit of employees employed in all sectors of a geographic area other than the

> industrial, commercial and institutional sector and the unit shall be deemed to be a unit of employees appropriate for collective bargaining.

The applicants submit the appropriate geographic area ought to be the province of Ontario for the electrical power systems sector and the Board Areas in which employees were working on the application date for the remaining sectors other than the industrial, commercial and institutional sector. The applicants argue that the electrical power systems sector has traditionally been viewed as a province wide sector. In light of the constant changes taking place with respect to that sector and the need for some stability, it is far more appropriate to establish a province wide electrical power systems sector in these applications they say. They point to the EPSCA Agreement and the labour relations structure that had been in place under that collective agreement to support their argument that a province wide geographic scope is appropriate for the electrical power systems sector.

34. The responding parties submit the appropriate bargaining unit ought to be limited to the Board areas where employees were working on the application date, and ought to mirror the bargaining unit description found in the EPSCA Agreement for that Board area. In the alternative, they submit the unit under section 158(2) should be limited to the Board area or areas where employees were working for all sectors of the construction industry other than the ICI sector.

35. EPSCA argues the Board has never found a province wide electrical power systems sector appropriate for collective bargaining. In *Ontario Hydro*, [1998] OLRB Rep. May/June 456, the Board determined the appropriate bargaining unit for an application for certification in relation to the ICI sector made under section 158(1) of the Act was province wide in the ICI sector and all other sectors in Board Area 3. I note in that case the parties had agreed to limit the geographic scope of all sectors other than the ICI sector to Board Area 3. A similar result obtained in *Matassa Inc.*, unreported, Board File No. 0564-04-R, decision dated May 18, 2005, Q.L. cite [2005] OLRD No. 2157 in which the Board refused to extend the scope of the electrical power systems sector beyond the Board Area in which employees were working on the application date. The Board wrote at paragraph 12:

> In the circumstances of this case, I am not prepared to depart from the general proposition that the Board will not grant a province-wide certificate which would include Board Areas where the applicant union does not have members working on the date of the application for certification outside the industrial, commercial and institutional sector of the construction industry.

The Board in *Matassa Inc.* relied on the Board's earlier decision in *T. A. Andre & Sons (Ontario) Limited*, unreported, Board File No. 2134-04- R, decision dated September 27, 2004, in which the Board wrote at paragraph 7:

> The applicant seeks a "Province-wide unit", although it has identified only one Board Area where work was being performed on the application date. The Board has generally held that in the construction industry, an applicant is entitled to certification outside the ICI sector only in respect of those Board areas where employees were working on the application date (*Freure Construction*, [1991] OLRB Rep. Mar 309). The Board has held that a bargaining unit which includes Board areas where no one was working is not an "appropriate" bargaining unit.

In *Accel Electrical Contractors Limited*, unreported, Board File No. 0911-01-R, decision dated June 27, 2001, Q.L. cite [2001] OLRD No. 2558 the Board wrote at a paragraph 7:

> A unit that encompasses Board areas in which there are no employees working on the application date is not, in my view, an appropriate bargaining unit.

See also *E/E Fradema Masonry*, [1986] OLRB Rep. Dec. 1685 and *Freure Construction Limited*, [1991] OLRB Rep. March 309.

36. Section 158(2) of the Act permits an application to be brought for a unit of employees in all sectors of the construction industry in a geographic area other than the ICI sector. Not only do I consider Board geographic areas in which no employees were working on the application date as not being an appropriate area, it seems to me that section 158(2) would not permit a bargaining unit to be described in province wide terms for one sector with the other sectors being confined to the Board Area in which employees were working. I therefore do not accept that a bargaining unit description that provides for a province wide electrical power system sector and the Board Area for all other sectors except the ICI sector is appropriate for collective bargaining.

37. It seems to me the circumstances of these applications are identical to the circumstances before the Board in the *T. A. Andre & Sons (Ontario) Limited* matter. Consistent with the Board's approach in that application and for the reasons set out above I am satisfied the appropriate bargaining unit in these six applications should be limited to the applicants' trade or craft in all sectors of the construction industry other than the industrial, commercial and institutional sector in the Board Areas in which employees were working on the application date.

38. The parties advised me the responding parties may have been bound by subsisting collective agreements with the applicants at the time the applications were filed that did not overlap with the bargaining units for which they sought certification. Nevertheless, the parties agree that the bargaining unit description for each of these applications should exclude employees covered by subsisting collective agreements between the applicants and responding parties.

39. The Board therefore finds the following units are appropriate for collective bargaining in each of these six applications:

Board File No. 0170-04-R Canform Structures Limited

40. All construction labourers in the employ of Canform Structures Limited in all sectors of the construction industry save and except the industrial, commercial and institutional sector in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, the Regional Municipality of Durham, the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen, persons above the rank of non-working foreman and persons covered by subsisting collective agreements with the applicant.

Board File No. 0171-04-R Eastern Construction Company Limited.

41. All construction labourers in the employ of Eastern Construction Company Limited in all sectors of the construction industry save and except the industrial, commercial and institutional sector in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, the Regional Municipality of Durham, the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen, persons above the rank of non-working foreman and persons covered by subsisting collective agreements with the applicant.

Board File No. 0924-04-R Canform Structures Limited.

42. All carpenters and carpenters apprentices in the employ of Canform Structures Limited in all sectors of the construction industry save and except the industrial, commercial and institutional sector in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, the Regional Municipality of Durham, the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen, persons above the rank of non-working foreman and persons covered by subsisting collective agreements with the applicant.

Board File No. 1800-04-R Ellis-Don Corporation.

43. All carpenters and carpenters apprentices in the employ of Ellis-Don Corporation in all sectors of the construction industry save and except the industrial, commercial and institutional sector in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen, persons above the rank of non-working foreman and persons covered by subsisting collective agreements with the applicant.

Board File No. 2934-04-R Eastern Construction Company Limited.

44. All carpenters and carpenters apprentices in the employ of Eastern Construction Company Limited in all sectors of the construction industry save and except the industrial, commercial and institutional sector in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen, persons above the rank of non-working foreman and persons covered by subsisting collective agreements with the applicant.

Board File No. 4185-04-R Eastern Construction Company Limited

45. All carpenters and carpenters apprentices in the employ of Eastern Construction Company Limited in all sectors of the construction industry save and except the industrial, commercial and institutional sector in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen, persons above the

rank of non-working foreman and persons covered by subsisting collective agreements with the applicant.

46. The applications in Board File Nos. 0170-04-R (Canform Structures Limited), 0171-04-R (Eastern Construction Company Limited), 1800-04-R (Ellis-Don Corporation), and 2934-04-R (Eastern Construction Company Limited) are referred to the Manager of Field Services to appoint a Labour Relations Officer to meet with the parties in order to finalize the lists of eligible voters, open the ballot boxes and count the ballots cast in the representation votes ordered by the Board.

47. On the taking of the representation votes directed by the Board in Board File No. 0924-04-R (Canform Structures Limited) by decision dated June 11, 2004 and in Board File No. 4185-04-R (Eastern Construction Company Limited) by decision dated March 10, 2005, more than fifty per cent of the ballots cast by employees in each of those two bargaining units were cast in favour of the applicant.

48. Certificates will issue to the applicant with respect to Board File Nos. 0924-04-R and 4185-04-R.

49. The Registrar will destroy the ballots cast in the representation vote taken in Board File Nos. 0924-04-R and 4185-04-R following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before then.

0050-06-ES Casino Rama Services Inc., Applicant v. Willis Paul Jr. and Director of Employment Standards, Responding Parties.

Employment Standards – The employer challenged the Notices of Contravention and Order to Pay issued in this matter, arguing that the employee had been offered and rejected reasonable alternative employment – The Board found that (a) an unequivocal offer was made in a series of memoranda addressed to employees, (b) the employee refused the offer by remaining silent and failing to take any action after receiving the offer, and (c) the alternative employment offered was reasonable – Training and proficiency requirements did not render the offer equivocal or mean that the employee could not likely perform the job offered – A period of training may be part of an offer of reasonable alternative employment – Any subjective expression of anxiety regarding the ability to perform the job offered was irrelevant if it had no objective basis – The employee was not entitled to rely on a medical condition to claim that the offer was unreasonable without having raised it first with the employer – Notices of Contravention rescinded and Order to Pay revoked

BEFORE: *Mary Anne McKellar*, Vice-Chair.

APPEARANCES: *Paul Jarvis, Debra Pratt, Norm Rondea* and *Steve Weel* appeared for the applicant; *Willis Paul Jr.* appeared on his own behalf; *Sidney Peters* and *Cheryl Armstrong* appeared for the Director of Employment Standards.

DECISION OF THE BOARD; January 17, 2007

Introduction

1. This is an application under section 116 of the *Employment Standards Act, 2000* ("the Act") for review of Order to Pay No. 22736 and an application under section 122 of the Act for review of two Notices of Contravention. The Order to Pay issued in respect of termination and severance pay that the Employment Standards Officer ("the ESO") found owing to the claimant, Willis Paul, Jr. ("Paul") and the Notices of Contravention issued against the applicant ("Casino Rama") for its failure to provide Paul with notice of termination (or pay in lieu) and severance pay.

The Facts

2. I heard evidence from three witnesses: Paul; the ESO; and Steve Weel, Casino Rama's Director of Slot Technical Services at all times material to Paul's claim.

3. Paul was employed by Casino Rama as a "slot attendant". His duties included the following: explaining the rules of the various games to customers; providing information or answering questions about the casino's facilities; paying out jackpots that exceeded those that could be paid out by the machines themselves; and filling the machines' hoppers with game tokens.

4. When Paul commenced his employment as a slot attendant, customers could play the machines by purchasing and inserting tokens into them, or by placing paper currency of various denominations into the bill validator. Casino Rama decided to move from this form of play to a system known as Ticket In-Ticket Out ("TITO"). Under TITO, a customer could insert currency into the slot machine and play. When the customer decided to cash out, either to move to another machine or to collect a jackpot, the slot machine would print out a ticket with a bar code representing the dollar value remaining. That ticket could then be inserted into another machine or could be exchanged for currency. Under TITO, machines would still contain tokens, but only as a back-up to TITO. Along with the introduction of TITO, Casino Rama intended to increase the amount of the jackpots that could be paid out by the machines themselves. The impact of these changes was that fewer slot attendants would be required.

5. There is no dispute that Casino Rama called a meeting of slot attendants in May 2003 and announced its intention to implement the TITO system and indicated that it would result in staffing reductions. This meeting was followed up by a series of memos. Some were addressed and delivered to individual slot attendants. Some were addressed to "all slot attendants" and posted on the bulletin board in the slot attendant office where these employees signed in at the commencement of their shifts. At least one of the latter form of memo was both posted on the bulletin board and delivered to each slot attendant.

6. This is a synopsis of the content of the memos:

> a) June 16, 2003 – this memo was addressed to individual slot attendants and hand-delivered. It indicated that: TITO implementation would commence on or about December 1, 2003; would be phased in; would

result in staff reductions; and that full-time staff reductions would occur last and would be based on seniority. The memo also stated "Casino Rama is committed to providing alternate employment for current full and part time Slot Attendants. All full time Slot Attendants are being offered a full time Dealer position; and all part time Slot Attendants are being offered a part-time Dealer position". The memo then went on to outline in some detail the mechanism by which slot attendants might assume the dealer positions. These matters are discussed in some further detail later in this decision. The final element of this memo worth highlighting at this point is the statement: "if a [slot attendant] elects NOT to accept this Dealer position offered to them, it will be their responsibility to secure alternate employment with Casino Rama; if they fail to do so, their employment could end as early as 90 days from the date of AGCO approval for TITO".

b) April 21, 2004 – this memo was also addressed to individual slot attendants and hand-delivered. It commences" "This memo will act as official notice for the reduction of the Slot Attendant position". The memo further states: "As previously stated, Casino Rama is committed to providing alternate full time and part time employment for the current full and part time Attendants. The position that will be made available to full and part time staff will be that of a Table Games Dealer. If you elect NOT to accept the Dealer position, it will be your responsibility to secure alternate employment with Casino Rama; if you fail to do so, your employment could end as early as 90 days from the date of this letter." This memo goes on to outline how employees ought to indicate whether they wished to become dealers and various matters relating to training, and set out timelines for exercising those options. Again, these matters will be addressed in further detail below.

c) April 22, 2004 – this was a posted memo. It addresses the issue that Casino Rama had not yet provided slot attendants with an estimate of the magnitude of the anticipated staff reductions and that persons were therefore unsure whether they had sufficient seniority to retain their positions or should accept the Dealer position and commence the training. The memo advises that the staffing estimates for the slot department after TITO would be posted before the deadline to sign up for dealer training.

d) April 23, 2004 – this was a posted memo. It indicates that the projected number of full time Slot attendants required after the TITO implementation would be 44.

e) July 29, 2004 – this memo was addressed to individual slot attendants and hand-delivered. It indicates that staffing reductions will commence on August 17, 2004, and will be conducted in phases. The memo also goes on to state: "This letter is confirming that your end date with the Slot Department will be September 14/2004. On September 15/ 2004, if you have taken Table Games training, you will be transferred as a Dealer (you must have passed the table test) and assigned a shift and days off. If you have chosen not to take the Table Games training or failed to pass the table test, and have not secured

> employment with another department, your employment with Casino Rama will be terminated as of the date mentioned above."

> f) August 24, 2004 – this was a posted memo. It advised that the staff reduction scheduled for September 14, 2004 would be delayed until November 23, 2004 or possibly until January 5, 2005. It indicated that the "firm reduction date" will be announced closer to November 23, 2004.

> g) September 28, 2004 – this memo was posted and hand-delivered. It states, "It has been decided that the staff reduction that was to take place on November 23rd / 2004 will now be delayed until January 18th / 2005. The firm reduction date will be announced closer to January 18th / 2005."

7. Dealers deal cards for table games. Each dealer is required to be able to deal three different games. In the case of the slot attendants affected by the TITO implementation, Casino Rama set up a 6-week training program for those wishing to become dealers. The training program was designed to teach them to deal blackjack and they were to be assessed at the end of the program. If they passed the assessment, they would be assigned shifts as dealers. Over the next year, they would be expected to master two additional table games. All of the training was provided by Casino Rama at no expense to the employees, who were paid their regular hourly rate while attending it, and whose schedules were modified as necessary to accommodate their attendance. Casino Rama advised that, of the 25 or so slot attendants who took the training, all but 4 or so passed the assessment at the end and commenced work as dealers. Of the remainder, two opted to undertake additional training provided by Casino Rama. One of them completed and passed it. The other did not complete the training but secured a job in another department part way through, which is what also happened to the other two individuals who did not successfully complete the training at the first go-round. In other words, all full-time slot attendants who entered the dealer training remain employed by Casino Rama on a full-time basis, the vast majority of them as dealers. The initial offering of the training program, including the assessment portion, occurred prior to the cessation of Paul's employment.

8. Apart from the need to know the table games and be able to execute them, there are few other differences between the terms and conditions of employment for full-time slot attendants and full-time dealers. Their work location is essentially the same. They may be scheduled for any shifts during the week. The casino operates 24 hours per day and 7 days per week. Both are employed in a customer service capacity and both are expected to be able to explain the games to the players and to provide general information about the casino facilities and operations. The benefits package is the same for all full-time employees.

9. Paul was #57 on the full-time seniority list for slot attendants. He did not indicate to Casino Rama that he wished to become a dealer. He did not approach anyone in management to indicate any reason why he could not become a dealer. He did not apply for another position elsewhere in the Casino. He knew his position would be redundant and he did nothing about it. His employment was terminated on January 18, 2005. He did not receive termination or severance pay. He filed this claim. Within two weeks of the date of his termination, he became employed as Native Games Inspector at the casino operated by the Mohawk on the reserve at Akwesasne, and he acknowledged that his brother hired him and that he had known for the previous three years that a job would be available to him there.

10. There was some dispute at the hearing about which of the memos referred to in paragraph 6 of this decision that Paul had seen or received. I will deal with this issue later. There is no doubt however that he knew that staff reductions were coming and that he knew before the deadline to sign up for dealer training that he would be affected. He also acknowledged that he knew from the memo summarized at paragraph 6(g) that his employment would end on January 18, 2005.

11. Paul said that he did not wish to become a dealer for several reasons. These are the reasons he gave, in the order in which he gave them. The first was that he would make less money. The second was that he lacked the cognitive ability to learn the table games or keep track of the cards. The third was that he had arthritis and could not shuffle the cards. His evidence was less than reliable on all of these matters.

12. Although Paul asserted that full-time dealers made less than full-time slot attendants, he initially denied knowing what dealers made. When I pointed out this inconsistency to him, he altered his testimony and estimated that, taking account of both their hourly rate ($12.75) and tips, he had heard that dealers made $20 - $25 per hour. In fact, his estimate was quite accurate, as Casino Rama's evidence demonstrated that dealers averaged about $8 per hour in tips.

13. Paul's evidence was hardly more satisfactory with respect to his own earnings. His hourly rate was $15.45. He told the ESO he made approximately $300 per week in tips and she calculated her Order to Pay based on that. Paul did not file an application to review those calculations, nor did he indicate any dispute with the numbers at the outset of the hearing. Indeed, at the beginning of his cross-examination he confirmed that he made about $300 per week in tips. Later, he said it was closer to $500. He was adamant that his hourly earning, including tips were $30 - $40, even though a $500 tip a week would work out to an hourly rate of less than $30. He also indicated that he claims 10% of his employment income (which would be in the neighbourhood of $2.00 per hour) derives from tips in his tax return, but that he does not prepare it himself. Paul also offered that he does not pay income tax on his earnings in any event. Presumably, this reduces any incentive he might have to estimate conservatively that portion of his income arising from gratuities. In any event, he did not introduce any copy of records he had kept respecting his tips, or any copies of income tax returns he had filed indicating income from tips. At one point, counsel for Casino Rama put to Paul that the amount of his earnings attributable to tips could not be reliably determined based on his testimony and Paul conceded, "Maybe that's right". As counsel for Casino Rama pointed out, accepting his figure of $300 per week generated by tips, that would work out on average to somewhat less than $8 per hour, so that the real difference between his earnings and that of the dealers would be just under $2 per hour.

14. Although Paul said he lacked the cognitive ability to learn the table games or keep track of cards, the position that he subsequently assumed as Games Inspector is one that requires an individual to supervise the play of all games in the casino, which would require knowing all the rules and being able to observe and follow the play to ensure that it was done properly.

15. Paul's final reason for not wanting to become a dealer was that he was concerned he could not physically shuffle the cards due to arthritis. He was unable to provide any detail as to how often he was afflicted by arthritic pain or how severe it was. He acknowledged that he had never seen a medical practitioner about it and that he took no medication, save for the occasional

aspirin, for this condition. Finally, he conceded that he had never complained to any Casino Rama managers about it, nor had he expressed any concern to them that it might have an impact on his ability to perform as a dealer. There was undisputed evidence that two other slot attendants who approached management expressing concern about their physical ability to perform the dealer job succeeded with the assistance of management in securing employment in other departments in which they expressed a desire to work.

16. There is thus a significant basis for doubting the sincerity of the reasons Paul gave for not wanting to be a dealer. The doubt is compounded when one considers the reason that he did not articulate until asked about it on cross-examination: the fact that he had a standing job offer elsewhere.

17. While there was considerable testimony about which memos Paul received or saw, in my view not much ultimately turns on this for the reason that he acknowledged receiving either the memo summarized in paragraph 6(a) or 6(b) and he also acknowledged having a copy of the memo summarized in paragraph 6(g) at home.

Issues

18. The Order to Pay and the Notices of Contravention must be rescinded if the following questions are answered in the affirmative:

a) Was Paul offered a position as Dealer?;

b) Did he refuse it?;

c) Was employment as a Dealer a reasonable alternative to employment as a Slot Attendant?

19. If the above questions are not answered in the affirmative, the Order to Pay insofar as it relates to termination pay and the Notice of Contravention in respect of the same matter must still be rescinded if I find that Paul was provided with notice of termination as required by the Act.

20. Finally, even if I find a contravention of either or both of the notice of termination or severance pay provisions of the Act, I must consider whether this is an appropriate case in which to reduce the penalties assessed in the Notices of Contravention.

Analysis

21. Paul did not attend the second day of hearing, and did not make any closing arguments.

22. Counsel for the Director made certain submissions on the question of onus. It is not necessary to deal with them, and I do not propose to do so. I have been able to determine all of the facts necessary to dispose of this matter without resorting to onus. My silence on the subject should not be construed as an endorsement of any of the arguments made.

23. Counsel for both the Director and Casino Rama relied on *Re Hart & Cooley Manufacturing Co. of Canada Ltd.*, a decision dated June 27, 1986, by Referee Brown, and both characterized it as the leading case on the issues before me.

24. Counsel for the Director relied on *Hart & Cooley* in support of the following positions: (1) because of the requirement to successfully complete training before assuming the dealer position, it cannot be considered to be a position that was offered to Paul; or (2) if Casino Rama did offer employment to Paul, he did not refuse it for the reason that he was not in a position to accept it; and (3) the employment offered was not a reasonable alternative to the slot attendant position.

25. Casino Rama took the position that: (1) it clearly and unequivocally offered a dealer position to all the affected slot attendants, and the existence or not of any prerequisites to assuming the duties should be addressed under the rubric of reasonableness; (2) Paul refused the position because he did nothing to indicate acceptance of it within the specified time period, nor did he indicate any basis on which it was not an acceptable position to him; and (3) in terms of duties, compensation and benefits it was a reasonable alternative position and was not made unreasonable merely because there was a requirement for training and a demonstration of competence.

26. Hart & Cooley involved a situation where a plant in Fort Erie was scheduled to close. A related employer operated a plant in Oakville. There was sufficient work in Oakville that employment could have been provided to all of the Fort Erie workers. These workers were asked, in writing, if they would be interested in moving to Oakville. They were told that "transfer opportunities will be offered", but that "we cannot guarantee a move into a similar job". There were some further communications between the employer and some of the workers, but no more specific promises were made. The workers did not get back to the employer respecting the Oakville opportunities. The referee found that: (1) no offer of employment had been made; (2) if the employer's communications had constituted an offer, that offer had been refused; and (3) did not, in any event, constitute reasonable alternative employment. The passages of the reasoning pertinent to each of these determinations is set out below:

> 172... An offer is the manifestation on the part of one person of a willingness to be bound by certain terms and conditions. See Waddems [sic], *The Law of Contract* (2ed., 1984) at p.21. An offer in the statutory sense means a commitment to the employee by the employer of employment and the commitment must be clear and unequivocal. It cannot be framed in such a way so that the employer, in effect, is saying "I will offer you a position if you first indicate that you want one or if you are willing or disposed to accept one", or I will offer you a position if you otherwise meet certain qualifications and criteria which I am going to impose". The actions of the applicant were not the manifestation of a willingness to be bound by any terms and conditions relating to employment in Oakville.
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> ...
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> 175. In this case the applicant could have easily satisfied its obligation under the Act. Since the applicant took great pains to adduce evidence at the hearing, and I have found, that there were more than enough positions available at Oakville to absorb the work force at Fort Erie, it should have

made an unequivocal commitment to employ the respondents at the Oakville facility. Whether and to what extent the employment that was offered was reasonable alternative employment was an entirely separate and distinct question.

176. Having failed to make an offer, the employees were under no obligation to precipitate one by indicating their desire one way or another. While it may have been preferable for them to meet and discuss with representatives of management possible offers that might be forthcoming, they were under no obligation to do so and the union was under no obligation to encourage them in that regard. If the company was frustrated by the unwillingness of the employees to cooperate on these exploratory discussions, they could easily have sent to each employee an offer of employment at Oakville with a request that it be accepted within a reasonable period of time and that would have satisfied at least their obligation to make an offer of employment. Having failed to do so, they have also failed to show that they made an offer of reasonable alternative employment within the meaning of Section 40a(3)(a) of the Act.

...

a. If the discussions by Mr. Rae with the employees could have been characterized as an offer by the employer, I would have found that it was refused by the employees. Once an offer has been made it must be accepted within a reasonable period of time and certainly within the period of time expressed or implicit in the offer. The employees refused or at least failed to return the forms indicating their desires which were given to them on the initial interview. They refused to meet with Mr. Rae for a second interview at the Ft. Erie plant and showed little or no interest in travelling to Oakville at the applicant's expense in order to view the facilities and check out available housing. They knew precisely when the Ft. Erie plant would be closed. For this reason, the failure of the employees to accept the applicant's offer of employment, if it could have been viewed as such, would have been considered a "refusal" within the meaning of Section 40a(3)(a) of the Act.

...

188. In determining whether the employment offered is "reasonable alternative employment", the referee must take into consideration all the circumstances of the case, including the nature of the job offered compared with the one which the employee performed, any express or implicit understandings or agreements between the parties, the geographic proximity, or costs of dislocation, the comparable wages, benefits, working conditions and security and any objective personal circumstances which might reasonably militate against the acceptance of the position.

189. The test for reasonableness is an objective, not subjective, one. The issue is not whether the particular employee would have considered the offer reasonable alternative employment. The question in every case is whether a reasonable employee, under the same or similar circumstances, would have considered the employment offered as a reasonable alternative to the employment which he held with the same employer. Therefore the referee cannot take into consideration, "the emotional baggage of previous years"

> and the fact the employee would not consider the offer reasonable because of any personal distrust of, or animus for, the employer caused by some real or imagined wrong, or because he or she harbours some unreasonable fears or anxieties, is irrelevant. Swan (Referee) in *Dylex Ltd.*, dated March 18, 1986 at 54. However, personal circumstances apart from the employees [sic] state of mind, are to be treated as part of the objective facts and may be considered in determining whether the offer is one of reasonable alternative employment.

27. The final two paragraphs reproduced above from *Hart & Cooley* are the ones most often cited in decisions dealing with whether an offer of employment was reasonable. They are, of course, merely general statements of principle and must be applied to the facts of each case. In applying them to the situation confronting him, the referee in *Hart & Cooley* had the following to say about the issue of whether the job offered is comparable to the one the employee previously performed:

> 190. The general nature of character of the wok must be comparable. The satisfaction which an employee receives in the performance of work which draws upon his particular talents or skills is as much a part of employment as the wages and benefits he receives for doing it. It has been suggested that the work offered may be "so different in character as to make the offer unreasonable". Swan (Referee) in *Dylex Ltd.* dated March 18, 1986. A skilled worker must be offered a job which draws on those skills: an unskilled worker must not be offered a position whose skills he will not be given sufficient opportunity to, or cannot, master. It is not an offer of reasonable alternative employment to offer a skilled craftsman the job of a common labourer even if all other factors are equal. Nor, conversely, it is necessarily an offer of reasonable alternative employment to offer a common labourer the job of a skilled craftsman if he is not able or is not given the opportunity to acquire the skills necessary to perform.

28. The referee in *Hart & Cooley* also suggested that the reasonableness of an offer of alternative employment should be assessed having regard to the totality of the package as regards wages, benefits, working conditions, and job security, and specifically contemplated that a shortfall in one area might be compensated for by an improvement in another. This proposition has been applied in subsequent cases. In discussing the issue of seniority, the referee wrote:

> 205. Seniority, insofar as it protects job security or opportunities for advancement, is a significant factor in determining whether the employment offered is reasonable. *Dylex Ltd.*, dated March 18, 1986 at 60. However, seniority is only one of the factors which affect the status of an employee and it must not be considered in isolation. Thus, the most senior employee in a company teetering on the brink of insolvency may have less job security than the least senior person in a company which is financially healthy and operating in a strong market. The question of job security, therefore, must be assessed not only with reference to any particular seniority clause, and the individual's place within it, but also with reference to all those circumstances of the general economy or market conditions that might affect an employee's opportunity for advancement or protection of job security when compared to his previous employment.

29. I now turn to apply the principles articulated in *Hart & Cooley* to the facts of this case.

30. Casino Rama did not merely offer the slot attendants continued employment in some unspecified position. It offered them all positions as dealers. The offer contained in the first two memos summarized in paragraphs 6(a) and (b) of this decision was clear and unequivocal. Paul acknowledged having received one of these memos, although he could not recall which one. The fact that employees had to demonstrate proficiency as dealers before assuming duties does not mean that the offer was not clear and unequivocal. It was. The conditions of employment, including the demonstration of proficiency, must be considered, not under the rubric of whether an offer was made, but under the rubric of whether that offer was reasonable. On the first question, I find that an offer was made to Paul.

31. The next question is whether Paul refused the offer. Certainly we know that he did not accept it, or make any communications to management about it. In other words, he behaved similarly to the Fort Erie workers in *Hart & Cooley*. It will be recalled that the referee there indicated that he would have found such conduct to have constituted a refusal. Counsel for the Director submitted that Paul was not in a position to accept the dealer position because his arthritis and cognitive abilities prevented him from performing its duties. Again, I think the issues of any impediments to Paul's ability to perform as a dealer must be assessed under the rubric of whether the dealer position was a reasonable alternative to the slot attendant position, having regard to his personal circumstances On the second question I find that Paul, by remaining silent and failing to take any action after the offer was communicated to him, must be found to have refused the offer.

32. The crux of this case turns on whether the dealer position offered (including any conditions or prerequisites attached to that position) was a reasonable alternative to the slot attendant position. Of course the positions were not identical, and that has never been held to be a requirement of the legislation. Certain conditions under which the positions were performed were, however, identical, and need only be briefly mentioned. The workplace location, interaction with customers, role as casino ambassador and source of information, and the benefits package were the same for full-time dealers and full-time slot attendants.

33. Although counsel for the Director suggested that the hours of work or shifts might have been different, I heard no evidence from Paul on the question of shifts and his availability/unavailability for them. I did hear that Casino Rama operates 24 hours a day, 7 days per week, and employees can be assigned to any shift. In these circumstances, I cannot find any meaningful difference in terms of the hours of work, between the two positions.

34. Counsel for the Director also suggested that the dealer position was not a reasonable alternative to the slot attendant position because Casino Rama did not indicate in its communications how employees' seniority would be affected by the transfer. Again, this is not a reason Paul advanced for not wanting to be a dealer. Furthermore, neither the dealers nor the slot attendants are represented by a trade union or covered by a collective agreement. They do not, therefore, enjoy "seniority rights" in the technical sense. There may be some advantages that accrue to long-service employees, but I heard no evidence at all about how those advantages may or may not have been affected by slot attendants becoming dealers. The most important feature of a true seniority system is that it offers greater job security to long-service employees in the

event of a lay-off or slow down, but, as the referee in *Hart & Cooley* notes, seniority is far from the only measure of job security. It seems to me that there is little doubt that the kind of technological change that led to the reduction of the number of slot attendants with the introduction of TITO is far less likely to occur in the table games area: dealers will always be required to deal the cards. If there is a general downturn in the business of Casino Rama, that will presumably be visited upon the casino as a whole, slot machine play as well as table play. Again, on the basis of the evidence I heard, I cannot find that Paul would have enjoyed less job security as a dealer than he enjoyed as a slot attendant.

35. Insofar as wages are concerned, the difference between what the dealers take home and what Paul claims to have taken home as a slot attendant is about 10%. Counsel for Casino Rama noted that this is within the range of wage differential that has been found to be acceptable or reasonable. Counsel for the Director did not dispute that assertion. *Barclay Terrace*, [1998] O.E.S.A.D. No. 283 is an example of a decision in which the Board found that a job involving a 10% diminution in pay and a loss of benefits previously enjoyed nevertheless constituted reasonable alternative employment. The Board came to that conclusion after considering the total package of employment terms and conditions offered by each of the positions under consideration.

36. Did the requirement that slot attendants undertake training and pass an assessment before working as dealers made the latter position unreasonable? I do not think that it did. Casino Rama offered the training at its expense, on work time, with no loss of pay, to slot attendants. The requirement to be proficient in three different games immediately was waived. *Hart & Cooley*, in a passage reproduced earlier, contemplates that a period of training may be part of an offer of reasonable alternative employment. The training was offered, and completed, well in advance of Paul's last day of work. The majority of the participants successfully completed it. There is no basis for any suggestion that Casino Rama was offering a job that its current slot attendants could not likely perform. While there is a fair amount of caselaw standing for the proposition that offering an employee a *less demanding* job in terms of skills or responsibilities does not constitute reasonable alternative employment (see for example, *Zellers Inc.*, [1992] O.E.S.A.D. No. 55; and *Dominion of Canada General Insurance Co.*, [1998] O.E.S.A.D. No. 218), there are few, if any, cases where the offer of a *more challenging* job was held not to be reasonable: indeed, the opposite has been suggested:

> 21…As is evident from this decision, the standard is an objective one. That is, an employee is not entitled to refuse alternate work simply because it is new or challenging if, on an objective basis, a reasonable employee would be prepared to accept the alternative employment. As the adjudicator in *Re Houri*, [1995] O.E.S.A.D. No. 72 (Bradbury) said:
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>> It is clear from her evidence that the Applicant takes the position that the only reasonable offer is a return to her former position as bakery cashier. It is also clear that her personal preference was influencing her view about the reasonableness of the offers. When she was asked about other positions in cross examination, specifically, work as hostess or waitress, her answer was that she could not do the job because she had never done it. While I can understand how difficult it may be to try a new position after such a long time, I am also satisfied that personal preference is not an appropriate basis for deciding the issue. The Applicant's reason

> for refusing is essentially subjective and not objective and was based, at least in part, on an [sic] accurate view of what the position entailed. I am also satisfied that the Employer acted in good faith, given the slowdown in his business, in making the decision that he no longer needed a full-time person as cashier in the bakery section on a daytime shift. Therefore, I conclude that a reasonable employee in similar circumstances would have considered the offer set out in Option 2 as a reasonable alternative to the former position.

It is perhaps worth noting that in the *Houri* case, the employer's offer included the provision of training the employee, at the employer's expense, in the new position.

37. There remains the question of whether the dealer position was an unreasonable one for Paul having regard to his personal circumstances. His expressed concern that he lacked the cognitive ability to do it, even if that concern were credible, would not make the dealer position unreasonable: it is merely a subjective expression of anxiety with no objective basis. As for the concern about the arthritis, my view is that Paul cannot rely on that in the absence of having raised it with Casino Rama. On this point, I approve of and follow the determination of a different panel of the Board in *Coquette International Inc.*, [2006] O.E.S.A.D. No. 1257:

> 30. Further, she appears to have made no efforts or inquiries regarding alternative methods to get to the new location. It is simply not sufficient to do nothing, as Ms. Parasram appears to have done, and then submit a letter from her physician, more than a year later, indicating she cannot drive. Nor is it reasonable, as Ms. Parasram appeared to do, to expect the applicants to surmise that because she was ill with depression in 2001, that she could not drive to the new location in 2005. Employees who require accommodation have the duty of advising their employers of that need. It is not for the employer to guess this is the case. Consequently, I find that the offer of continuing employment at the new location was reasonable, and that Ms. Parasram was not constructively dismissed.

38. For all of the above reasons, I find that Casino Rama offered Paul reasonable alternative employment, which he refused. He is therefore not entitled to termination or severance pay.

39. It is unnecessary to address the alternative arguments of whether Casino Rama complied with the notice of termination requirements of the Act, or provided Paul with a period of greater notice than required.

Disposition

40. The Notices of Contravention are rescinded.

41. Order to Pay No. 22736 is revoked. The Director is directed to remit all funds held in trust in respect of it to Casino Rama forthwith.

2986-06-M National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Applicant v. **Clayson Steel (1988) Inc.**, Responding Party.

Interim Order – Unfair Labour Practice – The applicant sought interim reinstatement of five laser operators it alleged were laid off because of their participation in the applicant's organizing drive – The employer argued it had *bona fide* business reasons for the lay-offs, as well as for the choices of individuals it chose to lay off – The Board applied the criteria for interim relief found in s. 98 of the Act – For three of the employees, whom the Board found to be organizers, the Board was not able to conclude that their lay-offs were unrelated to the organizing campaign – For the other two employees, who were supporters but not organizers, the Board again could not conclude the employer's motives were completely unrelated to the union's drive – Interim order granted

BEFORE: *Peter F. Chauvin*, Vice-Chair.

APPEARANCES: *L. N. Gottheil, Jean Smith, Chris Pawlak, Kandiah Baskaran, Nazar Mohammed, Macario Vaz, Mark Upshall* and *Zehra Quizilbash* for the applicant; *Greg McGinnis, Joe Fontana, Enrico de Pasquale* and *Dominic Vecchiarelli* for the responding party.

DECISION OF THE BOARD: January 19, 2007

1. This is an Application for Interim Order brought pursuant to section 98 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). This Application for Interim Order pertains to an Unfair Labour Practice Complaint ("the ULP Complaint") which the Applicant ("the CAW") has also filed.

2. In the ULP Complaint the CAW submits that Kandiah Baskaran, Krzysztof (Chris) Pawlak, Macario Vaz, Mark Upshall and Nazar Mohammed (referred to hereafter as "the declarants") were inside organizers or supporters of the CAW's organizing campaign and were laid off because of this. In the Application for Interim Order, the CAW seeks, among other remedies, an interim order directing the immediate reinstatement of the declarants, pending the adjudication of the ULP Complaint.

3. Clayson Steel (1988) Inc. ("Clayson Steel") submits that its lay off of the declarants had nothing to do with the declarants having engaged in any union activities. To the contrary, Clayson Steel submits that the declarants were laid off for proper business reasons.

The Facts

4. A Consultation was held in this matter. The following are the facts that were either agreed to or were not refuted. I will also specifically note where allegations were made that were challenged by the other party.

5. Clayson Steel manufactures precision parts for heavy equipment and has experienced serious financial difficulties in the last few years. All of the declarants are Laser Operators

except Mr. Mohammed, who works in the brake department. Since January 2004 its total employment has been reduced from approximately 150 to slightly less than 50 non-management employees.

6. In November, 2004 the CAW conducted an organizing campaign and applied for certification. However, the CAW did not win the representation vote and the application was dismissed.

7. In late September, 2006 Clayson Steel permanently laid off 9 employees and temporarily laid off 5 employees. Mr. Upshall was laid off for 6 days. Mr Mohammed was laid off for 8 days.

8. In late October, Mr. Baskaran, Mr. Pawlak and Mr. Vaz started talking about having another union organizing campaign. They contacted the CAW and were put in touch with Mr. Smith, a CAW organizer. On November 23, 2006 they met with Mr. Smith. They signed CAW membership cards and Mr. Smith gave them additional cards. Over the next two weeks they discussed the CAW with other employees and some of the other employees signed the cards.

9. On November 29, 2006 there was a Managers' meeting. Mr. Baskaran alleged that following the meeting Mr. Vecchiarelli, Maintenance Manager, approached him and said that the Human Resources Manager, Mr. Jason Spalding, had said at the Managers' Meeting that there was a rumour that someone was trying to form a union. Mr. Baskaran alleged that Mr. Vecchiarelli asked him whether he knew anything about that. Mr. Baskaran alleged that he gave no indication that he knew anything about that.

10. Mr. Vecchiarelli denied the account given by Mr. Baskaran. Rather, Mr. Vecchiarelli alleged that around late October Mr. Baskaran approached him and complained about the selection of lead hands and also said that he had heard rumours of union organizing. Mr. Vecchiarelli alleged that he had seen no evidence of union organizing and alleged that he thought that Mr. Baskaran only mentioned unionization as leverage to get his way. Accordingly, Mr. Vecchiarelli alleged that he did not take the comment seriously and did not report the comment to Mr. Fontana, the General Manager. Mr. Baskaran denied that such a conversation took place in late October.

11. Mr. Baskaran alleges that on December 5, 2006, Mr. Spalding called him into his office and said, among other things, that he was aware that Mr. Baskaran was involved in the union organizing campaign. Mr. Spalding was terminated on December 7, 2006 and he did not give a declaration or attend at the consultation. As such, Mr. Baskaran's allegation went unchallenged.

12. On December 6, 2006 Mr. Baskaran, Mr. Pawlak and Mr. Vaz were approached by their supervisors regarding overtime for December 7, 2006. They allege that they were offered and that they accepted the overtime. Mr. Fontana alleges that the supervisors were only inquiring whether they were available for overtime on December 7, 2006. The supervisors did not give a declaration or attend at the consultation.

13. Approximately two hours later, Mr. Fontana permanently laid off Mr. Baskaran and temporarily laid off Mr. Pawlak, Mr. Vaz, Mr. Mohammed and Mr. Upshall, citing a shortage of

work. In Mr. Baskaran's case, Mr. Fontana also said that Mr. Baskaran's wage rate was too high and was part of the reason he was chosen for lay off. Mr. Baskaran was previously a supervisor and his wage rate is almost seven dollars more than any other Laser Operator. Mr. Baskaran alleged that he offered to agree to a lesser wage rate to avoid being laid off, but Mr. Fontana was unwilling to discuss this. Mr. Fontana denied that Mr. Baskaran made such an offer.

14. On December 6, 2006 six other employees were also either permanently or temporarily laid off, including three indirect labour staff and two office staff.

15. In the five weeks preceding December 6, 2006 the declarants usually worked between five to ten hours of overtime per week. In the month following December 6, 2006 employees in the laser and brake departments continued to work a similar amount of overtime.

16. Mr. Fontana alleges that he selected the declarants to be laid off without consulting Mr. Spalding or anyone else, that he had no knowledge of any union organizing, and that his selection of the declarants was, therefore, in no way tainted by any anti-union animus. Mr. Fontana specifically alleged that Mr. Spalding did not say anything to him about any suspected union organizing campaign or any conversation Mr. Spalding had with Mr. Baskaran regarding the CAW. The CAW disputed this, alleging that it is unrealistic to think that Mr. Fontana would have selected the declarants for lay off without consulting with Mr. Spalding or anyone else, and that Mr. Spalding would not have discussed with Mr. Fontana any suspicions regarding union organizing.

17. Mr. Fontana alleges that the general practice is to lay off the most junior employees within the classification on the relevant shift, subject to the need to retain employees who are cross-trained to perform other jobs as well. Clayson Steel submitted that it also considers other issues, such as the employee's skills, abilities, work performance, disciplinary record and rate of pay. Mr. Fontana alleges that his selection of the declarants was based solely upon these criteria, and was not motivated or tainted by any anti-union animus.

18. Mr. Fontana alleges that: Mr. Baskaran was selected for permanent lay off because he is being paid almost seven dollars per hour more that any other Laser Operator; Mr. Pawlak and Mr. Vaz were selected for temporary lay off because they have the least service of the Laser Operators on the day shift, with the sole exception of Mr. Tolentino, who has been cross-trained to perform other work as well; Mr. Upshall had just served a disciplinary suspension; and, Mr. Mohammed had the least service on the day shift in the brake press area. Also, Mr. Fontana submitted that it primarily laid off employees on the day shift because he wanted to reduce the size of the day shift.

19. On December 21, 2006 the CAW filed an Application for Certification for a bargaining unit consisting of all employees of Clayson Steel, save and except forepersons, persons above the rank of forepersons, office, clerical and sales staff. By decision dated December 28, 2006 the Board ruled that the CAW appeared to have provided membership support for at least 40% of that bargaining unit and ordered that a representation vote be conducted on January 3, 2007. The ballot box was sealed and the ballots have not yet been counted. The CAW has requested that its ULP Complaint be heard first and that it be granted automatic certification pursuant to section 11 without ever opening the ballot box.

20. The voters' list for the proposed bargaining unit consists of 50 persons. Messrs. Baskaran, Pawlak, Vaz, Mohammed and Upshall have approximately 15, 8, 8, 4 and 4 years of service respectively and are numbers 7, 26, 27, 38 and 42 respectively on a length of service list provided by Clayson Steel. There are several people with less service than the declarants, who perform the same work as the declarants, and who were not laid off.

21. Other relevant facts regarding the declarants are as follows. All of the declarants work on the day shift, except Mr. Upshall, who works on the afternoon shift. None of the declarants, have a disciplinary record, except Mr. Upshall, who received a six day suspension in November, 2006. Mr. Upshall and Mr. Mohammed were not CAW organizers. Rather, they allege that they supported the CAW. Mr. Upshall alleged that he was often seen speaking with Mr. Pawlak.

The Law

22. I can grant an interim order to re-instate the declarants only if the CAW has proven that the following four conditions have been met (see section 98(2)):

> 1. The circumstances giving rise to the pending proceeding occurred at a time when a campaign to establish bargaining rights was underway.
>
> 2. There is a serious issue to be decided in the pending proceeding.
>
> 3. The interim relief is necessary to prevent irreparable harm or is necessary to achieve other significant labour relations objectives.
>
> 4. The balance of harm favours the granting of the interim relief pending a decision on the merits in the pending proceeding.

23. Even if those conditions are met, I am precluded from issuing such an interim order if it "appears" to me that the lay offs were unrelated to the organizing drive (see section 98(3)). To put it in the affirmative, I can grant the interim order if it appears to me that the lay offs were related to the organizing campaign.

The CAW's Submissions

24. The CAW submits that the lay off of the declarants had anti-union motives, has had a chilling effect upon its organizing campaign and has undermined its ability to obtain the confidence of the employees. The CAW submits that unless the declarants are immediately reinstated, the CAW's efforts to be certified may be frustrated. Also, the CAW submitted that even if it is certified, it may not be able to effectively represent the employees or to negotiate a collective agreement for them, because the employees will be afraid to support the CAW.

25. The CAW submits that all of the criteria of subsection 98(2) have been met and it does not appear that the lay offs were unrelated to the CAW's organizing campaign. Accordingly, the CAW requests that the Board immediately reinstate the declarants.

26. The CAW relied upon *Cornwall Gravel Co.*, [2006] O.L.R.D. No. 2425, Board File No. 0830-06-M (June 30, 2006); *Metrican Stamping Co.*, [2005] O.L.R.D. No. 4781, Board File

No. 2174-05-M (November 23, 2005); *Patrolman Security Services Inc.*, [2005] O.L.R.D. No. 4053, Board File No. 1928-05-M (October 6, 2005); *Sarnia Paving Stone Ltd.*, [2005] O.L.R.D. No. 3997, Board File No. 1792-05-U (October 3, 2005); *Tate Andale Canada Inc.*, [1993] OLRB Rep. October 1019; *UPS Supply Chain Solutions Inc.*, [2005] O.L.R.D. No. 3737, Board File No. 1262-05-R (September 14, 2005); *D.M.S. Concrete & General Contracting Inc.*, [2005] O.L.R.D. No. 3611, Board File No. 1290-05-U (September 7, 2005); *Electrical Contracting*, [2006] CanLII 21250 (ON L.R.B.) and *Sitel Customer Care Inc.*, [2006] CanLII 27540 (ON L.R.B.).

Clayson Steel's Submissions

27. Mr. Fontana submits that its general practice is to lay off the most junior employees within the classification on the relevant shift, subject to the need to retain employees who are cross-trained to perform other jobs as well. Clayson Steel submitted that it also considers other issues, such as the employee's skills, abilities, work performance, disciplinary record and rate of pay. Mr. Fontana alleged that his selection of the declarants was based solely upon these criteria, and was not motivated or tainted by any anti-union animus.

28. Clayson Steel submits that: Mr. Baskaran was selected for permanent lay off because he is being paid almost seven dollars per hour more than any other Laser Operator; Mr. Pawlak and Mr. Vaz were selected for temporary lay off because they have the least service of the Laser Operators on the day shift, with the sole exception of Mr. Tolentino, who has been cross-trained to perform other work as well; Mr. Upshall had just served a disciplinary suspension; and, Mr. Mohammed had the least service on the day shift in the brake press area. Also, Clayson Steel submitted that it primarily laid off employees on the day shift because it wanted to reduce the size of the day shift.

29. Clayson Steel submits that in view of its financial difficulties, if it is required to reinstate the declarants it will thereafter have to implement further lay offs. Clayson Steel also submits that its overall labour costs have gone down since December 6, 2006, notwithstanding that overtime has continued to be worked.

30. Accordingly, Clayson Steel submits that the CAW has not proven that the four criteria of section 98(2) have been met and that, in any event, there is an appearance that the lay offs are unrelated to any alleged organizing drive.

Analysis

31. I find that all of the requirements in section 98(2) and (3) have been met and I order that Clayson Steel reinstate the declarants, for the following reasons.

32. It is the unchallenged evidence of Mr. Smith and the declarants that there was an organizing campaign underway as of December 6, 2006. Ultimately, an application for certification was filed on December 21, 2006 with an appearance of at least 40% membership support.

33. The ULP Complaint alleges that the five declarants were laid off because they supported the organizing campaign. Consistent with all of the recent section 98 cases, I find that amounts to a serious issue to be decided.

34. Clayson Steel submits that there is no irreparable harm to the CAW because the CAW has already filed an Application for Certification in which it requests automatic certification under section 11 without a vote. However, I am satisfied that the reinstatement of the declarants is necessary to either prevent irreparable harm to the CAW's organizing campaign or to achieve the other significant labour relations objective of ensuring that the CAW will be able to effectively represent the employees should the CAW be certified. In the absence of reinstating the declarants, the employees may be too intimidated to show support for the CAW, with the result that the CAW's ability to negotiate a collective agreement may be seriously undermined, if the CAW is successful in its certification application.

35. I am also satisfied that the balance of harm favours granting the reinstatement of the declarants. The harm to the CAW is discussed above. Clayson Steel submitted that in view of its financial difficulties the labour expenses that it will be exposed to should it be required to reinstate the declarants will outweigh the harm to the CAW. I do not agree, because this decision does not prohibit Clayson Steel from subsequently implementing further lay offs, provided that such lay offs do not violate the Act. I will discuss this in more detail later in this decision.

36. The more challenging issue is whether it appears that the lay offs were unrelated to the organizing campaign. That issue is easier to resolve with regard to Messrs. Baskaran, Pawlak and Vaz, each of whom have at least 8 years of service and were union organizers. Having regard to the service list, there are several other Laser Operators with less service than Messrs. Baskaran, Pawlak and Vaz. The skills and abilities of the other employees were also reviewed. Even taking into consideration Clayson Steel's submissions that it laid off according to shift and also considered whether the employees were cross-trained, and Mr. Baskaran's wage rate, it remains unclear to me why Messrs. Baskaran, Pawlak and Vaz were laid off rather than other employees. As such, in view of that and the role that Messrs. Baskaran, Pawlak and Vaz played in the organizing campaign, the unchallenged allegations regarding Mr. Baskaran's conversation with Mr. Spalding, and the timing of the lay offs, I am not able to conclude that it appears to me that the lay offs of Messrs. Baskaran, Pawlak and Vaz were unrelated to the organizing campaign.

37. That issue is less clear with regard to Messrs. Upshall and Mohammed, who have approximately 4 years of service and were included in the earlier September 2006 lay off. They are lower on the service list and were CAW supporters, not inside organizers. Also, Mr. Upshall recently served a disciplinary suspension. However, notwithstanding the above, Clayson Steel's submissions still left it unclear why Messrs. Upshall and Mohammed were selected for lay off, rather than other employees. Again, as with the other three declarants, other employees with less service who were doing the same or less skilled work were not laid off. I am not able to conclude that the lay offs of Messrs. Upshall and Mohammed were unrelated to the organizing campaign.

38. Accordingly, I order Clayson Steel to immediately reinstate the declarants, pending the final determination, through the ULP Complaint, of the issue of whether the lay offs were in fact related to the organizing campaign.

39. As stated above, this decision does not prohibit Clayson Steel from implementing further lay offs once the declarants have been returned to work, provided that these lay offs do not violate the Act. In view of Clayson Steel's financial difficulties, the CAW did not dispute this, but requested that I either give Clayson Steel directions regarding which employees it should lay

off or that I order that Clayson Steel must consult with the CAW before it implements any such lay offs. I do not make such an order.

40. Clayson Steel stated that it takes many factors into consideration in determining who should be laid off, including service, skills, ability, cross-training, work performance, wage rate, shift and disciplinary record. I could not make a comprehensive analysis of all of these factors, as part of a one-day consultation, so as to be able to give a direction as to who should be laid off, if there are going to be further lay offs.

41. I also do not order that Clayson Steel must consult with the CAW in deciding which employees will be laid off. The CAW stated that ultimately it is Clayson Steel, not the CAW, that must make the decision of who, if anyone, should be laid off. Clayson Steel must make that decision very judiciously. It is now subject to the statutory freeze contained in section 86. The CAW may challenge that decision, alleging that those lay offs also violate the Act. Accordingly, it may be prudent for Clayson Steel to consult with the CAW in making that decision. Prior consultations with the CAW may lessen, or eliminate, the likelihood of such a challenge.

Disposition

42. The Board orders Clayson Steel to reinstate the declarants to their employment on the same terms and conditions they enjoyed prior to December 6, 2006 and to post a copy of this Decision and attached Notice to Employees for not less than 30 days in a location at Clayson Steel's Brampton plant where its employees are likely to see them.

Appendix "A"

The Labour Relations Act, 1995

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

We have posted this notice in compliance with a direction of the Board, issued after a hearing in which both the company and the union had the opportunity to make submissions.

The Board has ordered Clayson Steel (1988) Inc. to reinstate Kandiah Baskaran, Krzysztof (Chris) Pawlak, Macario Vaz, Mark Upshall and Nazar Mohammed ON AN INTERIM BASIS until the Board considers the reason for their lay off. A hearing before the Board will commence soon. The purpose of that hearing is to determine why they were laid off.

If the Board ultimately determines that Kandiah Baskaran, Krzysztof (Chris) Pawlak, Macario Vaz, Mark Upshall and Nazar Mohammed were laid off for proper reasons, and their support for the Union had nothing to do with their lay offs, the temporary reinstatement order will be revoked.

If the Board ultimately finds that their lay off occurred because they were union supporters, exercising their rights under the *Labour Relations Act*, the Board may confirm their reinstatements, and direct that they be compensated for all earnings and benefits lost as a result of their lay offs.

Employees in Ontario have these rights which are protected by law:

> An employee has the right to join a trade union of his or her own choice and to participate in its lawful activities.
>
> An employee has the right to oppose a trade union, or subject to the union security clause in the collective agreement with his or her employer, refuse to join a trade union.
>
> An employee has the right to cast a secret ballot in favour of, or in opposition to, a trade union if the Ontario Labour Relations Board directs a representation vote.
>
> An employee has the right not to be discriminated against or penalized by an employer or by a trade union because he or she is exercising rights under the *Labour Relations Act, 1995*.
>
> An employee has the right not to be penalized because he or she participated in a proceeding under the *Labour Relations Act, 1995*.
>
> An employee has the right to remain neutral, to refuse to sign documents opposing the union or to refuse to sign a union membership card.

It is unlawful for employees to be fired, laid off, or in any way penalized for the exercise of these rights. If this happens, a complaint may be filed with the Ontario Labour Relations Board.

It is unlawful for anyone to use intimidation to compel someone else to become or refrain from becoming a member of a trade union, or to compel someone to refrain from exercising rights under the *Labour Relations Act, 1995*.

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 30 consecutive days.

DATED this 19th day of January, 2007.

2527-05-G International Brotherhood of Electrical Workers, Local 353, Applicant v. **Comstock Canada Ltd.**, Responding Party.

Construction Industry Grievance – The IBEW sought enforcement of the provincial collective agreement for the electrical maintenance work it performed for Comstock at the Redpath Sugar Plant – Comstock denied being bound to the collective agreement and asserted it had entered into a General Presidents' Maintenance Collective Agreement – In the alternative, Comstock argued the IBEW was estopped from enforcing the principal agreement – The Board surveyed the parties' historical relationship, earlier grievances, local agreements, membership authorizations and continued efforts of various protagonists to enter into a GPMCA – Relying on s. 57 of the Act, the Board found that Comstock is bound by the principal agreement by virtue of its membership in the greater Toronto Electrical Contractors' Association, notwithstanding the apparent conduct of the parties (including the implementation of the GPMCA) which points to the opposite conclusion – As such, and pursuant to s. 55 of the Act, the GPMCA could not be enforceable absent the consent of the parties to the principal agreement - The Board further found that the elements of estoppel had been made out, but applied a time restriction to its enforceability – Grievance allowed

BEFORE: *Jack J. Slaughter*, Vice-Chair.

APPEARANCES: *Alan M. Minsky* and *Don Leitch* appearing for the applicant; *Richard J. Charney*, *Christina Grivakis* and *Dave Crawford* appearing for the responding party.

DECISION OF THE BOARD: January 24, 2007

1. This is a referral of grievance to arbitration pursuant to section 133 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act").

2. This grievance referral concerns maintenance work performed at the Redpath Sugar Plant ("Redpath") in downtown Toronto by members of the applicant employed by the responding party. Although the work at issue is maintenance work, the parties agreed that the Board has the jurisdiction to hear and determine this matter pursuant to the principles articulated by the Board in *Ideal Railings Limited* [1990] OLRB Rep. Dec. 1283; *Babcock and Wilcox Canada Ltd.* [1988] OLRB Rep. Dec. 1198; and *Carroll Electric (1982) Limited* [1983] OLRB Rep. Aug. 1282. These cases stand for the proposition that the Board has jurisdiction to hear a grievance pertaining to non-construction work where the union is a construction industry trade union and the employer is a construction industry employer as defined in subsection 126(1) of the Act. This proposition is especially apposite to a grievance concerning maintenance work, as the dividing line between construction work and maintenance is often a fine one.

Overview of the Legal Issues

3. This case concerns the resolution of three principal issues. The applicant argues the responding party is bound to the applicant's Provincial Electrical Employer Bargaining Agency Collective Agreement (the "Principal Agreement") for all its electrical work, including the electrical maintenance work at Redpath. The responding party denies it is bound to this collective agreement for electrical maintenance work. It contends it has validly entered into a General

Presidents' Maintenance Collective Agreement, which applies to this work. This is denied by the applicant. In the event the Board finds the responding party is bound to the Principal Agreement, the responding party argues that the applicant's conduct in this matter gives rise to an estoppel against the strict enforcement of the Principal Agreement.

Historical Background

4. Before turning to the legal issues in dispute in this grievance, it is useful to sketch in the factual backdrop setting the stage for the current conflict.

5. It is common ground that the responding party has performed maintenance work at Redpath since some time in the 1950s. For over 40 years, the responding party performed this work under a multi-trade maintenance agreement with various trade unions, including the applicant. The last multi-trade agreement to which the applicant and responding party were bound is a collective agreement dated December 11, 1996, and effective from March 1, 1997 to February 28, 1998 between the responding party as employer, and the applicant, Plumbers Local 46 and Millwrights Local 2309 as the Union parties.

6. At all material times, from at least the early 1960s, the responding party has been a member in good standing of what is now the Greater Toronto Electrical Contractors Association ("GTECA"). The evidence in this matter includes a 1964 authorization from the responding party to the Electrical Contractors Association of Toronto ("ECAT"), as the GTECA was then known, to act on the responding party's behalf in collective bargaining with the applicant. The details and effect of such authorization will be discussed more fully below. For now, it is sufficient to say that the responding party throughout has been a member in good standing of ECAT and its successors.

7. Since the early 1960s, the applicant and responding party have been bound by the applicant's major collective agreement, known across the spectrum of the electrical industry as the Principal Agreement. It is undisputed that the Principal Agreement has always encompassed industrial, commercial and institutional ("ICI") construction work. It also covers other types of work. The applicant maintains it has always covered maintenance work, at least in the "Scope of Agreement" article. However, both parties agree that an explicit maintenance schedule was only introduced into the Principal Agreement in 1986.

8. Prior to 1998, the responding party employed members of the applicant to perform maintenance work at Redpath and applied the terms and conditions of the then current multi-trade maintenance agreement to their work without objection from the applicant or ECAT. During this time, there is no evidence that either the applicant or ECAT sought to compel the responding party to apply the Principal Agreement to the maintenance work done at Redpath.

The Late 1990s – the Advent of the Principal Agreement at Redpath

9. By letter dated February 12, 1998, the applicant served the responding party with notice to bargain a new collective agreement for its members employed by the responding party to perform maintenance work at Redpath.

10. However, the applicant did not become party to a renewed multi-trade collective agreement. Rather, the applicant and the responding party embarked upon a new type of arrangement for the Redpath electrical maintenance employees.

11. In 1997, the Electrical Trade Employer and Employee Bargaining Agencies had incorporated a Market Recovery Plan ("MRP") into the Principal Agreement. The purpose of the MRP is to obtain or retain work for unionized electrical contractors which would encounter hardship if required to apply the full terms and conditions of the Principal Agreement on a particular project. An Amending Agreement dated May 28, 1997 put the MRP in place. It empowers the Business Manager of a Local Union in his exclusive discretion to enter into a Memorandum of Local Agreement (an "MLA") to amend any provision of the Principal Agreement on a project "as necessary from time to time".

12. On June 4, 1998, the applicant and the responding party entered into a MLA for the Redpath project. By definition, it made the Principal Agreement applicable to the maintenance work done on the Redpath project, but subject to the modifications set out in the MLA. More specifically, the conditions of market recovery were: "difference between double time and time and one-half pro-rated on maintenance hours". The term of the MLA was defined to be "until completion of project or until expiry of the Principal Agreement, whichever occurs first".

Into the New Millennium – The Mounting Conflict

13. By its express terms, the MLA for Redpath maintenance work was to expire with the then current Principal Agreement on April 30, 2001.

14. However, despite this fact, no correspondence was exchanged between the parties about the Redpath project in the months immediately preceding April 30, 2001. Although not explicitly stated by either party, it appears that the MLA continued in effect after April 30, 2001 on the same terms and conditions.

15. The first correspondence relating to this matter in the 21st century is a letter dated December 21, 2001 addressed to Don Leitch of the applicant from Eryl Roberts, Executive Vice-President of the Electrical Contractors Association of Ontario, and copied to Bob O'Donnell of ECAT, but not to the responding party. It reads as follows:

> It has come to my attention that you are considering a separate maintenance agreement for a particular client and contractor in the L.U. 353 jurisdiction.
>
> This is to advise you that the Principal Agreement covers non-construction work and includes a maintenance schedule applicable to all contractors and all clients in the L.U. 353 jurisdiction.
>
> The position of the ETBA is that the maintenance schedule in the L.U. 353/ECA Toronto appendix to the Principal Agreement is the only agreement applicable to ECAT contractors performing such work in L.U. 353's area.
>
> Should L.U. 353 enter into a separate arrangement with an individual client or contractor, the ETBA and ECAT will take whatever action is necessary

> through the grievance procedure or Labour Relations Act to nullify the arrangement.
>
> If you have any questions regarding this matter, please don't hesitate to contact me.

16. Although the responding party's Redpath project is not mentioned, it is common ground that it is the unstated subject matter of the letter. This is the first recorded objection to a "maintenance collective agreement" at Redpath. Nevertheless, the letter clearly articulates the position taken by the applicant in these proceedings, namely that the Principal Agreement and its maintenance schedule is the only agreement that can be applicable to ECAT contractors performing electrical maintenance work in the applicant's geographic area.

17. Next comes a letter dated April 9, 2002, from Joe Fashion, Business Manager of the applicant, to Tony Fanelli, Vice-President, Employee Relations & Safety, of the responding party. The text of Mr. Fashion's letter is as follows:

> With regard to the Redpath Sugar site in Toronto I felt it appropriate to send you a reminder of previous discussions you have had with our Don Leitch and Bob Gullins regarding the application of our working agreement for the site. Our position is that our Principal Agreement applies to all work at the project.
>
> It is my understanding the contract is up for renewal, April 15, 2002, and you will appreciate that all bidders must be able to submit a price based on a level playing field.
>
> Therefore any Market Recovery Agreements in place will cease as of May 1, 2002, anyone wishing to may apply under the terms of the Market Recovery Plan for assistance.
>
> Thank you for your attention in this matter and I will be pleased to address any questions you may have to this matter.

18. The first paragraph of Mr. Fashion's letter articulates a position consistent with that set out in Mr. Roberts' letter. The Board will have more to say about the consistency of the applicant's position below. The second paragraph is a reference to the responding party's commercial contract with Redpath. The third paragraph is more puzzling. According to its express terms, the MLA should have expired on April 30, 2001. As noted above, neither party said anything about the MLA in the period immediately prior to its expiry date. Then Mr. Fashion purports to terminate the MLA on three weeks' notice, despite the extremely lengthy history of the responding party enjoying separate maintenance conditions at Redpath.

19. The situation did not improve for either side in the short run. On April 24, 2002, the applicant's Business Representative Bob Gullins filed a grievance asking for damages from the responding party for its failure to apply the full terms of the Principal Agreement to maintenance work at the Redpath project from September 1, 2001 and continuing. Curiously, the applicant did not explain why it did not seek damages from May 1, 2001, nor why it was apparently reneging on Mr. Fashion's letter sent 15 days previously, stating that that the MLA would cease to apply as of May 1, 2002.

20. The applicant referred the grievance to the Board pursuant to section 133 of the Act. The responding party filed a response, asserting that the applicant should be estopped from claiming a violation of the Principal Agreement, given the history of the separate maintenance agreements, and the MLA, at the Redpath project. The responding party asked the Board to effectively extend the operation of the MLA to April 30, 2004 to coincide with the next expiry date of the Principal Agreement.

21. On January 21, 2003, the parties reached a settlement of the grievance, which reads as follows:

> L.R.B. File No. 0604-02-G
>
> **BEFORE THE ONTARIO LABOUR RELATIONS BOARD**
>
> **BETWEEN**
>
> **INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 353**
>
> **Applicant**
>
> **- and -**
>
> **COMSTOCK CANADA LTD.**
>
> **Responding Party**
>
> **MINUTES OF SETTLEMENT**
>
> WHEREAS the applicant and the responding parties were parties to a plant maintenance agreement covering the Redpath Sugar Company Project, 95 Queen's Quay E., Toronto (the "Project") which was effective from March 1, 1997 until February 28, 1998 following the termination of which the Principal Agreements from time to time in effect between The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and The International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario, binding upon the parties, have been applied by the parties to all of the work performed by members of the applicant engaged by the responding party at the Project;
>
> AND WHEREAS a Memorandum of Local Amendment was entered into between the applicant and the Electrical Contractors Association of Toronto on June 4, 1998 for market recovery to the responding party with respect to the difference between time and one-half and double time pro rated on hours worked by members of the applicant in the performance of maintenance work at the Project to provide market recovery to the responding party in respect thereto.
>
> AND WHEREAS the applicant notified the responding party that the Memorandum of Local Agreement would cease effective May 1, 2002;
>
> AND WHEREAS the applicant filed a grievance dated April 24, 2002 claiming various violations by the responding party of the current Principal

Agreement between The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and The International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario effective from May 1, 2001 until April 30, 2004 ((“the current Principal Agreement”) at the Project (the “Grievance”) which aire the subject matter of these proceedings.

THE PARTIES AGREE, each with the other, to settle these proceedings on the following basis:

1. The parties agree that they are bound by the current Principal Agreement.

2. The responding party acknowledges its violations of the current Principal Agreement at the Project as follows:

   (a) Articles 806A, 808L and 901 of the provincial section of the current Principal Agreement by reason of its failure to pay the required shift and overtime premiums to its employees engaged in the afternoon and night shifts;

   (b) Articles 906, 907 and Section 10 of the provincial section of the current Principal Agreement and Clauses 900E.1, 1000, 1001 and 1002 of the Local 353 Appendix to the current Principal Agreement by reason of its failure to make the payments and/or contributions required for vacation & statutory holiday pay and all other Union and Benefit Funds payable on the said shift and overtime premiums; and,

   (c) Articles 806 and 808L., 901, 906, 907 and 10 of the Provincial section of the current Principal Agreement and Clauses 900E.1, 1000 and 1001 of the Local 353 Appendix thereto by reason of its failure to pay 1 hour of overtime premiums to its employees for work performed by them between 11:00 p.m. and midnight on each and every Friday of each week.

3. The responding party forthwith agrees to pay damages in the amounts and to its employees set out in Schedule “A” attached hereto for the required shift and overtime premiums owed to said employees on account of the violations referred to in para. 2 above covering the period from January 1, 2002 to December 14, 2002.

4. The responding party agrees to comply with and abide by the terms and provisions of the current Principal Agreement including, without limiting the generality of the foregoing, to pay the required shift and overtime premiums to its employees engaged in the afternoon and night shifts and on Friday nights for work performed between 11:00 p.m. and midnight in accordance with/as required by the provisions of the provincial section and the Local 353 Appendix to the current Principal Agreement.

5. The applicant agrees to renew the Memorandum of Local Amendment with the Electrical Contractors' Association of Toronto to continue the market recovery which was previously provided to the responding party

under the Memorandum of Local Amendment dated June 4, 1998 with respect to the difference between time and one-half and double time pro rated on hours worked by members of the applicant at the Project engaged in maintenance work as set out in Schedule "B" attached hereto.

6. In consideration of the above-noted payments by the responding party, the applicant agrees to seek leave of the Board to withdraw the subject proceedings.

DATED at Toronto, this 21st day of January 2003.

BY THE APPLICANT **Per: ("Robert Gullins")**

BY THE RESPONDING PARTY **Per : ("T. Fanelli")**

MEMORANDUM OF LOCAL AMENDMENT
MARKET RECOVERY PLAN

In accordance with the Amending Agreement between the IBEW and the IBEW-CCO and the ETBA dated May 28, 1997, IBEW Local Union 353 and the Electrical Contractors' Association of Toronto mutually agree on the following Memorandum of Local Amendment for Redpath Sugar as follows:

1. Conditions of Market Recovery or Stabilization Fund relief granted, if applicable.

   DIFFERENCE BETWEEN DOUBLE TIME AND TIME & ONE HALF, PRO RATED FOR JOURNEYMEN AND APPRENTICES, ON MAINTENANCE HOURS WORKED TO A MAXIMUM OF $100,000.
   NOTE:

2. Other relief granted, if applicable.

   NONE

3. The terms of this Memorandum of Local Amendment shall be equally applicable to all contractors who are signatory to the Principal Agreement but it shall be the responsibility of each contractor to inquire whether or not a Memorandum of Local Amendment applies to a particular project or geographic area of the Local Union's jurisdiction.

4. The terms of the Memorandum of Local Amendment shall remain in force until APRIL 30, 2004 or until the expiry of the Principal Agreement, whichever occurs first.

EXECUTED BY THE PARTIES this ______day of _______ , 2002

For the Local Electrical Contractors Association of Toronto:	For the International of Electrical Workers Local Union 353:
____________________	____________________
Local ETBA Representative	Local Business Manager

cc ECAT

Schedule "A"
From January 1, 2002 to December 14, 2002

"Details of Wage Calculations Omitted"

22. Thus, the responding party admitted it was bound to the Principal Agreement and had violated the Principal Agreement. There is no question the admission of violations was in respect of maintenance work. The responding party also paid damages for these violations for the period January 1, 2002 onward. No one was able to explain the choice of that date. At the same time, the applicant agreed to reinstate the MLA in force up to April 30, 2004.

In the Wake of the Settlement – Comstock Makes A Move

23. Although Mr. Fanelli signed the above-mentioned minutes of settlement for the responding party, the evidence before the Board makes it clear he did not want the matter to rest there.

24. Over the next several years, the responding party actively sought changes to the Principal Agreement and its maintenance schedule, particularly with the Redpath project in mind. The evidence before the Board discloses that Mr. Fanelli exchanged correspondence, had discussions, and held meetings with ECAT's Executive Vice-President, Robert O'Donnell from July 11, 2002 through November 4, 2003 with a view to obtaining more favourable conditions from the applicant for the electrical maintenance work at Redpath Sugar. The responding party's primary, but not exclusive, concerns were hours of work, overtime and shift premiums.

25. These discussions did not bear immediate fruit. However, they did lead to the inclusion of proposals intended to address the responding party's concerns being tabled by the Electrical Trade Bargaining Agency in the 2004 Principal Agreement negotiations, as is evidenced by the "Local Bargaining Proposal" dated December 2003. This proposal included providing an electrical contractor bound by the Principal Agreement the opportunity to "make adjustments to the local maintenance agreement" through "the enabling clause of the market recovery program".

26. Time rolled on into 2004. The expiry of the 2001-2004 Principal Agreement and the Redpath MLA loomed on the horizon. Yet again, as in 2001, the evidentiary record shows no correspondence or discussions between the parties about Redpath electrical maintenance work in

the crucial months immediately prior to the MLA's express expiry date of April 30, 2004. However, the Principal Agreement was renewed by the electrical employee and employer bargaining agencies for a term effective from May 1, 2004 to April 30, 2007. The renewal agreement did include certain changes the responding party wanted for its Redpath electrical maintenance operations pertaining to the starting time for Sunday night shifts, and the applicability of overtime and shift premiums thereto. However, these changes did not give the responding party everything it had asked for, or felt it needed, to retain its commercial contract at Redpath.

Comstock's Quest for a General Presidents' Maintenance Agreement

27. Therefore, Mr. Fanelli was not satisfied with the outcome of Principal Agreement negotiations insofar as they did not give him the desired result for the responding party's electrical maintenance work at Redpath. He continued to be under pressure from Redpath's new owners, Tate & Lyle, to move to a different work schedule including a "Continuous Shift" system and 12 hour work days. The in-plant employees, represented by the Teamsters, were already working this schedule. Not only the electricians, but all the building trades were concerned about Tate & Lyle's position. The responding party's commercial contract was coming up for renewal. If the responding party could not be responsive to Tate & Lyle's demands, it could very well lose all the maintenance work to a non-union contractor, or to the in-plant forces.

28. Mr. Fanelli could not stand idly by. On September 9, 2004, he sent a letter to Steve Smillie, Executive Director of the General Presidents' Maintenance Committee for Canada (the "GPC"), indicating that Tate & Lyle had requested the responding party to pursue a General Presidents' Agreement ("GPA") for ongoing maintenance services at Redpath Sugar. He requested a meeting with the General Presidents' Maintenance Committee "for the purpose of discussing the current situation, and determine our next steps forward".

29. The GPC is an umbrella body. Its members are the international unions affiliated with the Building and Construction Trades Department of the AFL-CIO. Mr. Smillie is the Executive Director for both the GPC for Canada and the National Maintenance Council for Canada. At the relevant times, the Chair of the GPC was Don Oshanek of the Ironworkers, and the Vice-Chair was Tom McGreevy of the International Brotherhood of Electrical Workers (the "IBEW"), the parent body of the applicant. The purpose of the GPC is to negotiate maintenance collective agreements with owner clients of large facilities (such as car manufacturers and oil refiners) which encompass a unified body of terms and conditions of employment for the building trades performing maintenance work on site. The GPC's goals are to provide labour cost and employment stability to owner clients in order to preserve, secure, and enhance work opportunities for the members of its constituent unions.

30. Mr. Smillie testified that he contacted Mr. Fanelli after receiving the above-mentioned letter. He understood from Mr. Fanelli that the responding party's commercial contract with Tate & Lyle could be in jeopardy. Tate & Lyle was pressing for the responding party's employees to work on the continuous shift system in order to synchronize the hours of the building trades personnel with the hours worked by the in-plant forces. Mr. Fanelli wanted the GPC's assistance in retaining for the responding party the work it had long performed at the Redpath facility. Mr. Smillie understood that Tate & Lyle had the potential options of transferring the maintenance

work now performed by the building trades to in-plant forces, or contracting it out to a non-union contractor.

31. Mr. Smillie was provided with a copy of what Mr. Fanelli described as the "local maintenance agreement". Mr. Smillie has been engaged in implementing GPAs since March 1, 1990. He was well-aware that no GPA could be put in place without the consent of the affected local unions. He determined that a meeting should be held to "test the waters" at Redpath and see if there was any appetite there amongst the local unions for a GPA.

32. To this end, Mr. Smillie convened a meeting on October 13, 2004. Three of the six witnesses who testified herein were present for all or part of that meeting: Mr. Smillie; Dave Crawford, the responding party's Executive Vice-President; and Bob Gullins, the Business Representative of the applicant with responsibility for its members working at Redpath Sugar. All testified about their involvement in the meeting, and were subjected to skilful cross-examination. The Board has assessed their evidence carefully, having regard to the usual testimonial factors of clarity and consistency of recollection, firmness of memory, the ability to resist the pull of self-interest, and demeanour. The Board also has considered what is most reasonable and probable in the circumstances and in the context of the totality of the evidence in this case.

33. Mr. Gullins testified he went into the meeting with the view that the Principal Agreement was already in place and applicable to the responding party's maintenance work at Redpath. He knew the responding party was looking for changes in the applicable working conditions. He stated that in a conversation with Mr. Fanelli some days prior to the October 13, 2004 meeting, he "made it clear to Tony we could not stop them from doing what they wanted to do, but we were not interested in a separate agreement for the site". Nevertheless, Mr. Gullins attended the meeting as the applicant's representative with responsibility for the Redpath site.

34. The meeting proceeded in two separate parts. Mr. Smillie kept notes of the entire meeting and circulated them to all attendees, including Messrs. Crawford and Gullins. The typewritten circulated version of the Minutes was entered into evidence. Mr. Gullins' handwritten notes of the second part of the meeting were also entered into evidence. The first part of the meeting consisted of a presentation by Mr. Fanelli to the GPC in support of the responding party's request for a GPA at Redpath Sugar. The GPC and representatives of the responding party attended at this portion of the meeting, but the local union representatives of the various building trades were excluded. According to Mr. Smillie's *viva voce* testimony and the Minutes, the responding party's goal was to negotiate a GPA for the Redpath site, which would include a continuous shift system for the primary maintenance trades: the pipefitter, the millwright and the electrician. The Minutes acknowledge that a maintenance collective agreement was in place for the pipefitters and millwrights, while "IBEW Local 353 provides stabilization money to equate to maintenance conditions for its members". At the conclusion of the responding party's presentation near 10:00 a.m., the GPC determined that it should discuss the responding party's request with the local union representatives.

35. The local union representatives joined the meeting at 10:00 a.m. With respect to most of what occurred thereafter, there is general agreement amongst the oral evidence of all three witnesses and Mr. Smillie's notes. The responding party outlined the broad strokes of its proposal. The local union representatives voiced numerous concerns: the length of the 12 hour

day; heat exposure and safety considerations; work jurisdictional issues; likely resentment of new working conditions by long service employees; and the distinction between maintenance and construction work. All three witnesses agreed the Sheet Metal Workers vehemently and vocally opposed the GPA through their business representative Joe McPhail.

36. The discrepancies between the evidence of Messrs. Smillie and Crawford on one hand, and Mr. Gullins on the other, relate to whether Mr. Gullins expressed the opposition of the applicant to the GPA, and whether there was a "consensus to proceed" with the GPA at the end of the meeting.

37. On both items, the Board prefers the evidence of Messrs. Smillie and Crawford to that of Mr. Gullins. The latter was unsure who was chairing the meeting, whether there was a show of hands (although he thought there was not) and what exactly was said. He admitted he did "a lot more listening than talking" and was of the view it was a more "information type" meeting. He also recalls Jim Everett of the Plumbers specifically opposing the GPA as well as himself.

38. In contrast, Messrs. Smillie and Crawford were clear and consistent in their recollections, which are substantiated by Mr. Smillie's Minutes that were circulated to all local union attendees. They agree Mr. Oshanek chaired the meeting; that there was no vote by a show of hands; that only the Sheet Metal Workers were vocal in their opposition to the GPA; and finally that Messrs. Smillie and Oshanek declared there was a consensus to proceed. There is no doubt that Mr. Smillie is very experienced in these types of negotiations. He said that if there had been a clear "no" from the applicant, "that would have been the end of it". Instead, he recalled that no one was saying "don't go there" except Joe McPhail. In these circumstances, where he was dealing with "sophisticated local unions", Mr. Smillie and the GPC both took it that they had the "go ahead to continue the process".

39. The Board notes two significant facts at this juncture. Firstly, Mr. Gullins never took the position that the Principal Agreement was in itself a bar to the implementation of a GPA. Secondly, no one, especially Messrs. Gullins and Everett, ever took any steps to notify anyone that Mr. Smillie's Minutes of the October 13, 2004 meeting were incorrect in any respect; and in fact Mr. Gullins' notes about the Plumbers' comments state "doesn't look bad to them" and "can live with it".

40. Following the October 2004 meeting, Messrs. Smillie and Crawford held several meetings and had discussions with the GPC and Redpath to address numerous concerns raised by the local union business representatives and Redpath. These negotiations began in November 2004 and carried on into 2005. Finally, Redpath approved the GPA developed by Messrs. Smillie and Crawford. Mr. Smillie then notified the GPC and local union business representatives of a meeting to be held on June 7, 2005 to discuss a "draft" GPA for Redpath.

41. Messrs. Smillie, Crawford and Gullins attended and gave evidence about this meeting. Again, they agree about much of what happened, but differ in certain material aspects. Both Mr. Smillie's formal Minutes, which were circulated to the "Toronto Local Union Business Managers", and his handwritten notes of this meeting, were entered into evidence.

42. The first part of the meeting was a discussion between the GPC and the local union business representatives. Mr. Crawford was not in attendance at this part of the meeting, but

Messrs. Smillie and Gullins were. The background facts were reviewed and the "draft" GPA was presented. Various aspects of the agreement were discussed, and in particular the continuous shift system and reporting time provisions were examined. It was pointed out that while "not perfect", the GPA was "the best option" to "retain the maintenance work for the Building Trades and for the Owner to continue its reliance on union people for its maintenance work". There is no disagreement between Messrs. Smillie and Gullins on these facts.

43. They disagree on whether a poll was taken by a show of hands. Mr. Gullins insists there was, and that he voted "no". He also stated that he commented he was "not really in favour of the agreement but would not obstruct", which meant he would not obstruct the other trades putting the GPA in place for their members. He further testified he met with the applicant's job steward, Thomas Keeble, the next morning, and told him the applicant would oppose the GPA. In his testimony, Mr. Keeble confirmed that he met with Mr. Gullins at that time, but that while Mr. Gullins maintained that he had opposed the GPA, he did not specify how he indicated his opposition to it.

44. Mr. Smillie's testimony is quite different. He stated definitively that Mr. Oshanek chaired the meeting and went around the room trade by trade, canvassing the local union business representatives for their views. There was no vote by a show of hands. Both Mr. Smillie's handwritten notes and his formal Minutes are entirely consistent with this sequence of events. Mr. Smillie's view of the impact of Mr. Gullins' comments was that while the applicant was "not really in favour of the agreement", the applicant would not obstruct its implementation – in other words that the applicant was reluctantly approving the GPA.

45. The Board accepts Mr. Smillie's version of what physically happened – that there was no show of hands, but that there was a trade by trade canvass of the local union business representatives. Despite widespread circulation of the Minutes, no one but Mr. Gullins has ever suggested otherwise. Furthermore, the firmness and quality of Mr. Gullins' recollection of events generally left something to be desired. The meaning of Mr. Gullins' words is a separate issue, but is illuminated by what happened in the second phase of the meeting.

46. At that stage, the responding party's representatives came in. Messrs. Oshanek and Smillie announced the GPC had concluded there was general consensus and support to proceed with the implementation of a GPA for the site. Mr. Crawford was there. He observed Mr. Gullins, who he said was "low key", "not forceful" and appeared to be "going along with the deal". This accords with Mr. Smillie's opinion as well. Certainly, Mr. Gullins never asserted that there was "no deal". Nor did Mr. Gullins say that the Principal Agreement barred the implementation of the GPA.

47. In these circumstances, the Board draws the same conclusion that Mr. Smillie did – that Mr. Gullins on behalf of the applicant had reluctantly decided to "go along" with the GPA. Whether he had the legal right or capacity to do so is addressed subsequently in this decision.

The Steps to Put the GPA in Place

48. As mentioned above, Mr. Gullins met with Mr. Keeble on the morning after the June 7, 2005 GPC meeting with the local union business representatives. Mr. Keeble and the other members of the applicant performing maintenance work at Redpath were not at all happy to hear

of the looming GPA. By June 10, 2005, Mr. Keeble had a petition signed by the maintenance electricians ready for presentation to Rob Neil, the responding party's site supervisor, indicating that they would refuse to work 12 hour shifts. Mr. Keeble presented it to Mr. Neil and they met in Mr. Neil's office to discuss it.

49. This did not derail the GPA. On June 16, 2005, Mr. Smillie circulated his Minutes of the June 7, 2005 meeting to the responding party and to the Toronto Local Union Business Managers. In a covering letter of same date, he advised that "[w]e are finalizing the details of the agreement and the implementation date with Comstock. This should be resolved shortly". On that same date, the applicant's Business Manager, Joe Fashion advised Mr. Gullins he would be relieved of his business representative's duties effective June 17, 2005. At the time, Messrs. Fashion and Gullins were campaigning against one another for the position of Business Manager at the applicant in a hotly contested election race.

50. Over the next few weeks, Mr. Fashion did not challenge the accuracy of Mr. Smillie's Minutes or his intention to proceed with the GPA as outlined in his covering letter. To the contrary, he used Mr. Gullins' purported acceptance of the GPA against Mr. Gullins in the election campaign. Meanwhile, on June 20, 2005, the responding party, through Mr. Crawford, signed a new commercial contract with Tate & Lyle to perform continued maintenance work at Redpath. The term of the commercial contract is from July 1, 2005 to April 30, 2008. It is beyond doubt that the responding party relied on the GPA as its basis for entering into this commercial arrangement.

51. On July 5, 2005, Mr. Smillie circulated the final version of the GPA to the Toronto Area Local Union Business Managers and the responding party. It included changes favourable to the local unions on rest breaks and reporting pay, and specified that the term of the GPA would be from July 11, 2005 to June 30, 2008. Mr. Smillie then forwarded the GPA to the respective Building Trades' General Presidents for signature.

52. There was no response to Mr. Smillie's July 5, 2005 letter from the applicant.

The Aftermath – Local 353 Reacts to the GPA

53. On July 7, 2005, in a run-off ballot, Mr. Fashion defeated Mr. Gullins in the local union election, and retained his position as Business Manager of the applicant.

54. In mid-July 2005, Mr. Gullins obtained a copy of Mr. Smillie's Minutes of the June 7, 2005 meeting. In an e-mail he sent to Mr. Smillie on July 20, 2005, Mr. Gullins asserted that he was "not in favour of the deal" and that Joe Fashion had "in the days following June 16th used the inaccurate comments against me at the Redpath site for his own political election purposes". Mr. Gullins also reiterated his sense of the "will not obstruct" comment. In no way does Mr. Gullins assert the GPA is barred by the existing Principal Agreement.

55. On August 2, 2005, the applicant dispatched Paul Williams and 5 other members to work at Redpath under the GPA. The applicant's dispatcher, Robert White, testified that Mr. Fashion was aware of the referrals, but told him to go ahead and advise the members the work was under the GPA and the applicant would grieve. Mr. White added that 2 members refused to work on the continental shift system and were returned to the applicant's hiring hall.

56. However, no grievance was filed on August 2, 2005. In fact, the applicant said nothing about the matter until 4 weeks later on August 30, 2005, when Mr. Fashion advised Mr. Neil that employees of the responding party "must work and be paid under the conditions of the Principal Agreement", including "employees working at Redpath Sugar".

57. No actual grievance was filed until October 20, 2005, when the grievance now before the Board was sent to Mr. Neil by the applicant's counsel, Mr. Minsky. The grievance requests substantial relief for "our client's members employed from and after August 28, 2005 and continuing".

58. Finally, by letter dated November 14, 2005, Mr. Smillie advised Mr. Crawford as to which international unions had signed the GPA. In total, eleven building trades unions signed the GPA. The signing trades include the Plumbers, the Carpenters (on behalf of the Millwrights) and the Sheet Metal Workers. The IBEW did not sign. Mr. Smillie was advised by Mr. McGreevy that the IBEW's decision reflected the applicant's position. Mr. Smillie was angry. He thought he had the applicant's agreement to, and acceptance of, the GPA. As he quite bluntly put it, the "go ahead we thought we had on June 7 blew up".

THE LEGAL ISSUES – ANALYSIS AND DECISION

59. Although they phrased the issues in a slightly different fashion, both counsel for the applicant and counsel for the responding party submit that there are essentially three legal issues for the Board to determine in this matter:

> (i) Does the Principal Agreement apply to the electrical maintenance work at Redpath and is the responding party bound thereby for such work?
>
> (ii) Does the GPA apply to the electrical maintenance work at Redpath and is the responding party bound thereby for such work?
>
> (iii) If the Principal Agreement is applicable, is there an estoppel to its application?

Question (i)

60. The applicability of the Principal Agreement to the electrical maintenance work at Redpath is essentially a question of statutory and textual interpretation. In order to address this question, some additional details are necessary to supplement the factual summary provided above.

61. Mr. Robert O'Donnell, Executive Vice-President of the GTECA testified to confirm the responding party's long-term and ongoing membership in ECAT and the GTECA, and the authorizations issued to his association by the responding party. His evidence in this regard was not contested. However, the legal significance of the authorizations was squarely put in issue by the responding party.

62. Three separate authorizations were put into evidence. They read as follows:

MEMBERSHIP ACKNOWLEDGMENT

TO: Board of Directors,
Electrical Contractors Association
of Toronto,
43 Eglinton Ave East,
Toronto 12, Ontario.

The undersigned hereby acknowledges membership in the Electrical Contractors Association of Toronto, an unincorporated employers' organization and agrees to abide by the provisions of its constitution.

It is further acknowledged that the undersigned member is presently bound by the current collective agreement between The Toronto Electrical Labour Bureau and Local Union 353, International Brotherhood of Electrical Workers, and in the future shall be bound by any collective agreement made between the Association on behalf of its members and Local 353.

DATED this 29th day of June, 1964.

Canadian Comstock Co. Ltd.
Member

R. S. Carrington
Signature

Vice-President
Office Held

Representative to
Association

R. S. Carrington
Name

Alternate (if any)

D. Kewarth
Name

THE LABOUR RELATIONS ACT

EMPLOYER AUTHORIZATION

The undersigned Canadian International Comstock Co. Ltd. hereinafter
(name of employer)

called the Employer appoints the Electrical Contractors Association of Toronto, hereinafter called the Association, to represent the Employer as its bargaining agent in regard to its employees covered by the collective agreement with Local Union 353, International Brotherhood of Electrical Workers in the following area(s):

> The Counties of York and Peel, and the portion of Halton County east of the Eighth Line and south of the MacDonald-Cartier Freeway (Highway 401) and the portion of Ontario County west of the Rouge River,

and in the following sectors:

> The industrial, commercial and institutional sector, the residential sector, the sewers, tunnels and watermains sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector.

The Employer further appoints the Association as its agent and representative to make an Application for Accreditation under the Labour Relations Act of the Province of Ontario for the geographic area(s) and sectors above mentioned, and this Employer further vests all necessary authority in such organization to enable it to discharge the responsibilities of an accredited bargaining agent under the Labour Relations Act.

DATED at Toronto , Ontario, this 13th day of April , 1973

Canadian International
Comstock Co. Ltd.
....
(name of employer)

R. S. Carrington
By Vice-President
....
(title)

Witness Sam Kemsureh
....

SCHEDULE "A" TO BY-LAW NO. 1 OF THE BY-LAWS OF

THE ELECTRICAL CONTRACTORS ASSOCIATION OF TORONTO

MEMBERSHIP

ACKNOWLEDGMENT

TO: Board of Directors,
Electrical Contractors
Association of Toronto,
161 Eglinton Avenue East,
Toronto, Ontario.
M4P 1J5

The undersigned hereby acknowledges membership in the Electrical Contractors Association of Toronto and agrees to abide by the provisions of its by-laws.

The undersigned also acknowledges that it is bound by all collective agreements and renewals of collective agreements negotiated by or on behalf of Electrical Contractors Association of Toronto with Local 353, International Brotherhood of Electrical Workers, and any Designated Employee Bargaining Agency under the Ontario Labour Relations Act.

9th November 79.
Dated this .... day of .... 19.....

COMSTOCK INTERNATIONAL LTD.
....
Member Company

206 Laird Drive, TORONTO M4G 3W5
....
Company Address

....

P. J. Murphy
....
Signature (P. J. Murphy)

Division Vice-President
....
Office held

Representative to
Association

D. Kewarth
....
Name

63. None of the authorizations was ever modified or revoked. The responding party's membership in ECAT and the GTECA has been continuous and unbroken. From time to time, officials of the responding party have participated in one capacity or another in negotiations for the renewal of the Principal Agreement.

64. The responding party concedes it is bound to the Principal Agreement for work within the ICI sector of the construction industry. It denies it is bound to the Principal Agreement for the maintenance work at Redpath.

65. In support of its argument that the responding party indeed is bound by the Principal Agreement for the Redpath maintenance work, the applicant relies upon the authorizations cited above, the responding party's membership in ECAT and the GTECA, and the long existing Scope of the Agreement provision in Article 2 of the Principal Agreement, which provides in part as follows:

> **Union Jurisdiction**
>
> The Contractor agrees to recognize the inside and outside jurisdictions as outlined in the Constitution of the IBEW in the performance of all electrical work performed within the geographic jurisdiction of the Union as hereinafter defined:
>
> **Inside Work**
>
> All electrical signs, all street electrical decorations when no messenger or guy wire is necessary for support. Installation, construction, inspection, operation, maintenance and repair of all electrical work in isolated plants and within property lines of any given property, and beginning at the secondary side of the transformer, except line work consisting of poles and towers, including wires or cables and other apparatus supported therefrom and except all outdoor substations as defined in Outside Work hereof.
>
> When aerial wires or cables are used to provide electric current for buildings or structures within the property lines of any given property the inside men's jurisdiction shall start immediately after the first point of attachment of such aerial wires or cables to such buildings or structures.

66. The applicant further relies upon section 57 of the Act, the membership list supplied to it by the GTECA, the 1998 collective agreement, the 2002 Minutes of Settlement and the following decisions of the Board: *London Sandblasting & Painting Limited*, [1982] OLRB Rep. Sept. 1322; *Kennedy Electric Limited* (unreported decisions dated May 1, 1996 and May 23, 1997 in OLRB File No. 0165-95-G); *Bona Building & Management Co. Ltd.* 2004 Can LII 13194, [2004] O.L.R.D. No. 2407, Board File No. 3351-03-G (August 26, 2004) and 2004 Can LII 41974; *Andy Schollig*, [2002] OLRB Rep. Jan./Feb. 58; and *All Canada Crane Rental Corporation*, [2003] OLRB Rep. Sept./Oct. 693. The applicant characterized the history of separate maintenance agreements at Redpath as a "legal non-conforming use" which was brought to an end by the 1998 pick-up of the Principal Agreement with a MLA, and the clear wording of the 2002 Minutes of Settlement.

67. In response, the responding party acknowledges it has been a member of ECAT and the GTECA at all material times. However, it argues that the ECAT by-laws do not necessarily mean it is bound by ECAT collective agreements for all its work. It points to the long history of separate maintenance agreements at Redpath; the wording of the membership authorizations to ECAT; and the fact specific maintenance provisions were not inserted into the Principal Agreement until 1986. It postulates that the 1998 pick-up agreement with a MLA was a "package deal" and that the 2002 Minutes of Settlement constitute a free-standing collective agreement in their own right. The responding party relies on the following authorities: *Main Rehabilitation Co.*, [2001] O.L.R.D. No. 3496, Board File No. 0348-01-R (August 28, 2001); *Ontario Hydro*, [1998] O.L.R.D. No. 4120, Board File No. 0251-95-R (November 2, 1998); *Loblaws Supermarkets Ltd.*, [2003] O.L.R.D. No. 3731, Board File No. 1341-03-U (December 8, 2003) affirmed [2006] O.J. No. 406 (Div. Ct.); *Re Adams Mines and United Steelworkers, Local 6409 P & M* (1990), 11 L.A.C. (4th) 214 (Craven); *Laidlaw Waste Systems Ltd.*, [1987] OLRB Rep. October 1267.

68. The starting point for the Board's analysis must be section 57 of the Act, which provides as follows:

> **57.** (1) A collective agreement between an employers' organization and a trade union or council of trade unions is, subject to and for the purposes of this Act, binding upon the employers' organization and each person who was a member of the employers' organization at the time the agreement was entered into and on whose behalf the employers' organization bargained with the trade union or council of trade unions as if it was made between each of such persons and the trade union or council of trade unions and upon the employees in the bargaining unit defined in the agreement, and, if any such person ceases to be a member of the employers' organization during the term of operation of the agreement, the person shall, for the remainder of the term of operation of the agreement, be deemed to be a party to a like agreement with the trade union or council of trade unions.
>
> (2) When an employers' organization commences to bargain with a trade union or council of trade unions, it shall deliver to the trade union, or council of trade unions a list of the names of the employers on whose behalf it is bargaining and, in default of so doing, it shall be deemed to bargain for all members of the employers' organization for whose employees the trade union or council of trade unions is entitled to bargain and to make a collective agreement at that time, except an employer who, either alone or through the employers' organization, has notified the trade union or council of trade unions in writing before the agreement was entered into that the employer will not be bound by a collective agreement between the employers' organization and the trade union or council of trade unions.
>
> (3) A collective agreement between a certified council of trade unions and an employer is, subject to and for the purposes of this Act, binding upon each trade union that is a constituent union of such a council as if it had been made between each of such trade unions and the employer.
>
> (4) A collective agreement between a council of trade unions, other than a certified council of trade unions, and an employer or an employers' organization is, subject to and for the purposes of this Act, binding upon the council of trade unions and each trade union that was a member of or affiliated with the council of trade unions at the time the

> agreement was entered into and on whose behalf the council of trade unions bargained with the employer or employers' organization as if it was made between each of such trade unions and the employer or employers' organization, and upon the employees in the bargaining unit defined in the agreement and, if any such trade union ceases to be a member of or affiliated with the council of trade unions during the term of operation of the agreement, it shall, for the remainder of the term of operation of the agreement, be deemed to be a party to a like agreement with the employer or employers' organization, as the case may be.
>
> (5) Where a council of trade unions, other than a certified council of trade unions, commences to bargain with an employer or an employers' organization, it shall deliver to the employer or employers' organization a list of the names of the trade unions on whose behalf it is bargaining and, in default of so doing, it shall be deemed to bargain for all members or affiliates of the council of trade unions for whose employees the respective trade unions are entitled to bargain and to make a collective agreement at that time with the employer or the employers' organization, except a trade union that, either by itself or through the council of trade unions, has notified the employer or employer's organization in writing before the agreement is entered into that it will not be bound by a collective agreement between the council of trade unions and the employer or employers' organization.

69. In this case, the responding party has been a member of ECAT and the GTECA at all material times. Its initial authorization to ECAT in 1964 has never been retracted or modified. In that authorization, the responding party specifically agreed that it "in the future shall be bound by any collective agreement made between the Association on behalf of its members and Local 353". Nothing in the 1973 or 1979 authorizations limits the scope of the initial authorization. Rather the 1973 authorization specifically supported an ECAT accreditation application, while the 1979 authorization specified that, *inter alia*, the responding party was bound to the Provincial ICI Electrical Collective Agreement (which in fact is the Principal Agreement).

70. The Board does not need to delve into the complex arguments made by the parties to decide this issue. The language of section 57(1) is clear that a collective agreement made by an employers' organization is binding upon each person who was a member of the employers' organization at the time the agreement was entered into. This remains the case unless an individual employer has given the requisite notice in writing under section 57(2) before the agreement was entered into that the employer would not be bound by the collective agreement. Herein, the responding party was throughout a member of ECAT and the GTECA and never delivered a section 57(2) notice it would not be bound by the Principal Agreement in its entirety.

71. The Board's decision of May 23, 1997 in *Kennedy Electric supra* specifically endorsed the position that the Principal Agreement is a single collective agreement with construction and maintenance provisions, and not an amalgam of separate collective agreements. When the Principal Agreement was re-negotiated for the 2004-2007 term for a period effective from May 1, 2004 to April 30, 2007, it immediately went into effect and became applicable to all of the responding party's electrical maintenance work.

72. Therefore, the Board finds that the responding party is bound by the Principal Agreement in its entirety, and that perforce the Principal Agreement applies to the responding

party's electrical maintenance operations at Redpath. The Board's interpretation of section 57(1) is supported by the previous decisions in *London Sandblasting supra*; *C. H. Heist*, [1992] OLRB Rep. June 677, *Great Lakes Fabricating*, [1982] OLRB Rep. June 872; *Aluma Systems Canada Inc.* [1994] OLRB Rep. November 1469.

73. In making this decision, the Board is not unmindful of the long history of separate maintenance collective agreements at Redpath. Until this case, it appears that most, if not all of the parties, and in particular Mr. Gullins, carried on their affairs as if they were utterly unaware of the combined effect of Principal Agreement maintenance provisions, the triennial renegotiation of the Principal Agreement, and the operation of section 57 of the Act. Such conduct cannot oust the applicability of section 57, nor the binding nature of the entirety of the Principal Agreement upon the responding party. However, such conduct is highly relevant to the issue of estoppel, as discussed below. Furthermore, since 1998, the responding party has signed explicit documentation confirming that it is bound to the Principal Agreement for maintenance work, albeit coupled with certain concessions from the applicant. It is far too late for the responding party to gainsay its commitment to be bound by the Principal Agreement now.

Question (ii)

74. The responding party directed extensive evidence and argument towards the question of whether the 2002 Minutes of Settlement and/or the GPA constitute valid maintenance collective agreements in the circumstances of this case. Counsel for the responding party was quite eloquent and inventive in his argument. Counsel for the applicant was no less articulate in his counter-attack on the validity of the GPA.

75. However, in light of the Board's finding that the responding party is bound to the Principal Agreement in its entirety, it must be concluded that the applicant and the responding party had in place a pre-existing maintenance collective agreement through the maintenance provisions of the Principal Agreement at such time as the GPA was purportedly entered into. Section 55 of the Act is applicable in these circumstances and provides:

> **55.** There shall be only one collective agreement at a time between a trade union or council of trade unions and an employer or employers' organization with respect to the employees in the bargaining unit defined in the collective agreement.

Accordingly, section 55 of the Act and the pre-existing maintenance provisions of the Principal Agreement prevented the GPA from coming into force as a collective agreement. In any event, the GPA is a collective agreement between *international* building trade unions and the responding party. The IBEW has never signed the GPA. Mr. Gullins attended the meetings described above in the capacity of a representative of the applicant, and not as a representative of the IBEW, which in fact was represented there by Mr. McGreevy. Neither party called Mr. McGreevy to testify. There is no proof before the Board that the IBEW assented to the GPA. In fact, the evidence is to the contrary. Even if the IBEW had assented, the GPA could not come into operation in the face of the validly binding and pre-existing Principal Agreement covering the responding party's electrical maintenance work.

76. Mr. Smillie's evidence is quite consistent with this conclusion. He knew there were existing maintenance arrangements at Redpath (although not in the legal way determined herein). He also knew that the support of the local union business representatives was necessary to replace the existing maintenance arrangements with the GPA, because he boldly declaimed "if there was a clear no, that would have been the end of it". He thought there was local union support, but the applicant at a much later date clearly stated that it did not support the GPA. Mr. Smillie, visibly angry when saying so, testified that an international union does not have to participate in a GPA if it does not want to, and that the GPC has no position on whether the IBEW is bound to the GPA. He clearly placed the blame on the applicant for the IBEW's failure to sign the GPA, as it made a "different decision" after he thought the GPC had its "agreement and acceptance".

77. Due to the Board's conclusion on the binding nature of the maintenance provisions of the Principal Agreement on the responding party's operations at Redpath and the import of section 55 of the Act, the GPA could not be put into place in the manner the responding party sought to do so, absent the consent of the parties to the Principal Agreement. Such consent was never sought, and obviously was never granted. The IBEW never signed the GPA. However, the GPA discussions are highly relevant to the issue of estoppel.

Question (iii)

78. The responding party's alternative argument is that the applicant is estopped from enforcing the full terms and conditions of the Principal Agreement to its electrical maintenance operations at Redpath. First and foremost, it notes the almost half-century long practice of separate maintenance collective agreements at Redpath. For over 40 years, the applicant was part of a multi-trade maintenance agreement. In the 1998 collective agreement and the 2002 Minutes of Settlement, the MLA was an integral part of a "package deal" to apply the Principal Agreement to the Redpath maintenance work. In the 2004 and 2005 negotiations for the GPA, Mr. Gullins never once asserted the Principal Agreement as a bar. Both Messrs. Smillie and Crawford reasonably believed Mr. Gullins had gone along with the GPA on behalf of the applicant. The responding party entered into a commercial contract with Tate & Lyle in reliance on the applicant's acquiescence to the GPA. The responding party's first notification of the applicant's objection was Mr. Fashion's letter of August 30, 2005, well after the responding party had irretrievably altered its legal position. The responding party says an estoppel for the duration of the commercial contract is made out on these facts.

79. The responding party relies on the following authorities: *St. Mary's Paper Inc.* (1993), 30 CLAS 519 (Mikus); *Vancouver Police Board* [1987], 32 L.A.C. (3d) 214 (Hope); *Doman Western Lumber Ltd.* [1999] BCBAAA No. 355 (Devine); *Steds Limited*, [1992] OLRB Rep. January 67; *Aluma Systems Canada Inc. supra*; *Cronkwright Transport Ltd.* [1990], 13 L.A.C. (4th) 205 (Marcotte); *Re CN/CP Telecommunications and Canadian Telecommunications Union* (1981), 4 L.A.C. (3d) 205, affirmed 128 D.L.R. (3d) 236 (Div. Ct.); *C. H. Heist Ltd. supra*; *Toronto Dominion Bank* [1995] OLRB Rep. May 686.

80. The applicant denies there is any estoppel here. The applicant says estoppel requires proof of an unambiguous consent by the applicant which is not demonstrated on the facts before the Board. The applicant denies anything said or done by Messrs. Gullins and Fashion amounts to an estoppel. Alternatively, the applicant could and did bring the estoppel to an end by proper notice through Mr. Fashion's letter of August 30, 2005.

81. The applicant cited the following case law to the Board: *Toronto Dominion Bank supra; Aluma Systems supra; Chicago Blower*, [1994] OLRB Rep. June 645, *Natrel (Ontario) Inc.* (1999), 83 L.A.C. (4th) 55 (Newman).

82. The principle of estoppel may quite properly be described as a time honoured concept well-rooted in the law of equity. One will find reference to it in august authorities such as *Halsbury's Laws of England*; Lord Denning's decision on behalf of the English Court of Appeal in *Combe v Combe* [1951] 1 All E.R. 767; and D.J.M. Brown and D. Beatty *Canadian Labour Arbitration* (Aurora: Canada Law Book, looseleaf). However, at the end of the day, it is really just a simple matter of fairness.

83. In *Losereit Sales and Services Ltd.*, [1983] OLRB Rep. April 569, the Board simply but effectively described estoppel in these terms at paragraph 10, paraphrasing Brown and Beatty's definition:

> Thus, the essentials of estoppel are: a finding that there was a representation by words or conduct intended to be relied on by the party to which it was directed; some reliance in the form of some action or inaction; and detriment resulting therefrom...

Therein, the Board also confirmed that acquiescence or inaction could amount to a representation, relying upon the British Columbia Labour Relations Board's decision in *City of Penticton* (1978), 18 L.A.C. (2d) 307 and the arbitral decision in *Consolidated-Bathurst Packaging Ltd.* (1982), 6 L.A.C. (3d) 30 (MacDowell).

84. This Board has applied the doctrine of estoppel on many subsequent occasions including *Steds supra; Aluma Systems supra*; and *Ontario Sheet Metal & Air Handling Group* [1998] O.L.R.D. No. 4383. However, each case turns on its own facts.

85. In this case, both sides agree that there was a practice over many decades of a prevailing multi-trade maintenance collective agreement at Redpath. This practice persisted through the 1950s, the 1960s, the 1970s, the 1980s and well into the 1990s. This practice persisted despite the inclusion of the reference to maintenance work in the scope clause of the Principal Agreement for apparently as long as the Principal Agreement has been in force, and the specific introduction of the maintenance provisions in 1986. Until 1998, neither the applicant nor the responding party applied the Principal Agreement and its maintenance provisions to the maintenance work at Redpath in any way, shape or form.

86. The applicant's approach did change in 1998. In that year, it parted company from the Plumbers and the Millwrights, after the applicant's then President Bob Gill gave joint notice to bargain on behalf of the three trades. The applicant struck a deal with the responding party whereby the responding party would apply the Principal Agreement to the electrical maintenance work at Redpath with market recovery relief from the applicant's MRP on overtime. This was a "package deal" – the applicant received the nominal application of the Principal Agreement to the Redpath electrical maintenance work, and the responding party received monetary relief from the applicant's MRP. This was accomplished through an MLA. Based on the nature of the ongoing maintenance work at Redpath and the express language of the MLA, it followed that the MLA expired on April 30, 2001, the expiry date of the Principal Agreement.

87. However, as described above, absolutely no discussion or bargaining took place between the applicant and the responding party in the months immediately prior to the expiry date of the MLA. Both sides operated in apparently blissful ignorance of the legal implications of their arrangement. Conflict began in December 2001 with Mr. Roberts' letter to Don Leitch of the applicant, then escalated in 2002 through a flurry of correspondence, a grievance, a referral to the Board and the eventual resolution of matters in the January 21, 2003 Minutes of Settlement.

88. The parties spent a great deal of time arguing about what the Minutes of Settlement mean, and what they are. The Board can deal with both points summarily. They do not constitute a collective agreement, as was argued by counsel for the responding party. There is no recognition clause, no duration clause, nor any but the barest reference to terms and conditions of employment. The document is exactly what it purports to be, which is Minutes of Settlement of a grievance.

89. On a similar note, the Minutes of Settlement do not constitute a unilateral acceptance of the Principal Agreement *in toto* by the responding party for its electrical maintenance work at Redpath, as argued by counsel for the applicant. Instead, the Minutes of Settlement are another compromise, another "package deal". The applicant again gets the nominal application of the Principal Agreement maintenance provisions, while the responding party again gets the MRP monetary relief. In short, the parties came to the type of practical arrangement that typifies how labour relations are carried on at major construction and maintenance projects in Ontario.

90. The expiry date of the Minutes of Settlement was April 30, 2004, again a contemporaneous date with the expiry of the applicable Principal Agreement. Once again, the applicant and responding party did nothing in the crucial months prior to the expiry date. Furthermore, once again conflict broke out later on, through the responding party's attempted implementation of the GPA and the applicant's subsequent reaction to it.

91. The Board described the relevant events in detail above. Although Mr. Fanelli has for some time been out of the responding party's employ and did not testify, an accurate picture of his role was developed in the testimony of the other witnesses. The Board is satisfied that Mr. Fanelli and the responding party embarked on good faith negotiations with the building trades for a GPA in order to preserve the responding party's commercial contract, and the actual maintenance work for the members of the trades. Mr. Gullins, acting as a representative of the applicant, was part of those good faith efforts, although certainly not an enthusiastic participant therein.

92. Mr. Smillie struck the Board as a particularly credible witness. He is a veteran member of the GPC with lengthy experience in complex maintenance negotiations. As stated above, he knew the co-operation of the local unions was an essential prerequisite to a GPA where local arrangements were already in place. If Mr. Gullins had come out with a clear "no", for Mr. Smillie that would have been the end of the GPA in October 2004. That did not happen. It was reasonable in all the circumstances for Messrs. Smillie and Crawford to proceed with work on the GPA. Neither the applicant or Mr. Gullins ever told them not to do so, or that the October 2004 minutes were in any aspect incorrect.

93. Similar conclusions flow from the June 2005 meeting. For the reasons given above, the Board accepts Mr. Smillie's version of what happened there. In short, Mr. Gullins put

forward his concerns about how certain features of the GPA would affect Redpath's maintenance operations and the applicant's members working there, but he did not actively oppose the GPA. The only sensible meaning to be attributed to his words (as recorded in Mr. Smillie's handwritten notes) "will not obstruct – people will – not really in favour" is that Mr. Gullins reluctantly accepted the GPA on behalf of the applicant. The Board agrees with counsel for the responding party that Mr. Gullins' suggestion that what he really meant was that he would not obstruct or sabotage the other trades is ludicrous. Mr. Gullins had no authority to speak for the other trades and he knew it. Mr. Gullins' testimony was an *ex post facto* rationalization of his conduct at the meetings, arrived at in light of his election defeat by Joe Fashion.

94. Things do not end there. Before the term of the GPA was finalized in July 2005, the responding party entered into a lengthy commercial contract with Tate & Lyle on June 20, 2005, which expires in 2008. The effective dates of the GPA then were apparently set to match those of the commercial contract (at least there is no evidence to the contrary). The applicant was not consulted on the dates. No correlation was made to the prior Principal Agreement – MRP arrangements which expired contemporaneously with the then extant Principal Agreements. The GPA was simply put into place. Having said that, Mr. Smillie dutifully notified all Toronto Local Union Business Managers of what was being done. Not a peep of opposition was heard from any officer of the applicant until Mr. Fashion's letter of August 30, 2005, notwithstanding Mr. Keeble's earlier impromptu petition.

95. What legal result flows from these facts? Has the responding party made out an estoppel? The Board finds that it has. Through the words and conduct of Messrs. Gullins and Fashion, including the lack of timely objections and protests to the minutes of the October 2004 and June 2005 meetings, and other events in conjunction with the GPA, there was a representation of assent, or at least acquiescence, by the applicant to the GPA; the responding party relied on this representation in entering into its commercial contract with Tate & Lyle; and the responding party would suffer financial detriment if the applicant were allowed to resile from the GPA.

96. Therefore, all the elements for an estoppel have been established. There is proof of a representation, reliance on that representation, and detriment arising from such reliance. It would be unjust in all the circumstances for the applicant to be able to assert the application of the Principal Agreement in full force to the responding party's electrical maintenance operations at Redpath.

97. Yet, that is not the end of the story. An estoppel can be brought to an end by proper notice. Mr. Fashion's letter of August 30, 2005 put the responding party on notice the applicant has a problem with the rates being paid at Redpath. The applicant's grievance of October 20, 2005 clearly defines the applicant's position on the applicability of the Principal Agreement to electrical maintenance work at Redpath in considerable detail. Do either of these items end the estoppel, or does it continue to the end of the commercial contract in 2008, as the responding party contends?

98. The estoppel the Board is dealing with in this case arises in the context of a collective bargaining relationship, and not in the context of a commercial contract. The applicant and the responding party have had a collective bargaining relationship for the electrical maintenance work at Redpath for many years, albeit one more marked in recent years by a paucity rather than

an abundance of bargaining. Nevertheless, the terms and conditions of employment for the applicant's members at Redpath are precisely topics they should be bargaining about, rather than attempting to impose unilateral solutions upon one another.

99. The workplace parties have previously bargained practical resolutions to Redpath maintenance issues which expired on April 30, 2001 and April 30, 2004, consistent with the expiry dates of the then current Principal Agreements. Had they turned their minds to a collective bargaining solution to their problems in the current round, they would have reached an arrangement to go into effect until April 30, 2007, the expiry date of the current Principal Agreement. Given the conduct of the applicant, Messrs. Gullins and Fashion around the GPA, it would not be equitable to allow the applicant to enforce the Principal Agreement on maintenance work at Redpath until after the current version expires on April 30, 2007. Nor should the estoppel last beyond that date as a result of the responding party entering into a commercial contract with Tate & Lyle going beyond that date without input from the applicant. The parties rather should meet forthwith and fashion a practical solution amongst themselves.

100. The Board's disposition of this matter finds support in the case law. As arbitrator Hope said in *Victoria Times Colonist* (1984), 17 L.A.C. (3d) 284:

> The basis for a finding of detrimental reliance in an application of the doctrine of estoppel in a collective bargaining relationship appears to be the fact that the party adversely affected by a change in practice is prevented from pursuing a collective bargaining remedy during the currency of the collective agreement.

The view was cited with approval by the Board in *Otis Elevator Co. Ltd.* [1993] O.L.R.D. No. 591, Board File No. 3500-91-G (February 2, 1993); Similar sentiments were expressed in *CN/CP supra; Aluma supra; Lake Ontario Cement Ltd.* (1984), 13 L.A.C. (3d) 1 (M. G. Picher) and *Ontario Sheet Metal & Air Handling Group supra.*

101. In the latter case, the Board said that "[h]aving found that the elements of an estoppel have been established, the Board is of the view that the estoppel should have run until the parties had had an opportunity to bargain about this matter" (at paragraph 27). In *Aluma* the Board stated at paragraph 69 that:

> The purpose of an estoppel running till the end of a collective agreement is that the parties can then be in a position to bargain for changes to the collective agreement, which they may have been deprived of doing mid-term in the agreement when one party had decided to revert to the application of its strict legal rights.

102. The same considerations apply here. The parties have not had an opportunity to turn their minds to what terms and conditions of employment should apply to maintenance work at Redpath without benefit of the Board's ruling on the binding nature of the Principal Agreement to such work. The responding party cannot benefit from its unilateral decision to sign a commercial contract extending into 2008. Nor can the applicant suddenly revert to demanding strict compliance with the Principal Agreement it had never previously insisted upon. The Board finds an appropriate balance is struck by a finding that the applicant is estopped from applying the full

provisions of the Principal Agreement to maintenance work at Redpath until after the expiry of the current Principal Agreement on April 30, 2007.

CONCLUSION

103. For all of the foregoing reasons, the Board finds that:

(a) The Principal Agreement is binding upon the responding party for electrical maintenance work at Redpath.

(b) The GPA is not binding upon the responding party for electrical maintenance work at Redpath.

(c) The applicant is estopped from applying the Principal Agreement to the responding party's electrical maintenance work at Redpath for the period up to and including April 30, 2007. Until that date, the responding party may apply the terms and conditions of the GPA to such work.

104. The Board shall remain seized with this matter in the event there are further issues the parties wish to address, or to resolve any issues arising from the implementation of this award.

0726-06-R International Association of Machinists and Aerospace Workers, Applicant v. **Hawthorne Security & Communications Inc.**, Responding Party.

Certification – Conflict of Interest – Security Guards – The employer objected to the certification of a bargaining unit of security guards at its client AA, asserting that a conflict of interest would arise because a local of the applicant holds bargaining rights for two other groups of AA's employees – Although the parties focused their submissions on the extent that the guards monitor AA's employees, the Board found that monitoring made up only a small part of the guards' duties – Even the guards' obligation to search individual employees' vehicles in specific circumstances did not give rise to the conflict of interest contemplated by paragraph 1 of s. 14(5) – Certificate granted

BEFORE: *Brian McLean*, Vice-Chair

APPEARANCES: *Mark Wright, Gary Hynes, Darlene Dewar* and *Gary Scholl* for the applicant; *Stephen Bird* and *Robin Bront* for the responding party.

DECISION OF THE BOARD: January 23, 2007

1. This is an application for certification. A representation vote was held on June 12, 2006 and a majority of employees voted in favour of representation by the applicant trade union.

2. The name of the responding party is amended to read: "Hawthorne Security & Communications Inc.".

3. This application is for a bargaining unit of security guards who provide security services to Arnprior Aerospace ("AA"). One issue remains outstanding. The employer objects to the certification of the applicant under s.14 of the *Labour Relations Act, 1995* (the "Act"). It asserts that a conflict of interest would result if the union were to be certified because two bargaining units of AA's employees (one plant unit and one office/clerical unit) are represented by Local Lodge 1542 of the applicant. The union disagrees that a conflict would result if it is certified and the Board held a hearing to determine this issue.

The Facts

4. The employer is not primarily a security guard company. It is mainly an alarm company and a telephone answering business. Its only security guard contract is with AA, a manufacturer of airplane parts located in Arnprior. Until April or May 2005, the AA facility was owned by Boeing, which is now AA's biggest client.

5. The AA facility consists of two large buildings. Most of the property on which the buildings sit is enclosed by a security fence. However, there is a large parking lot outside of the fence where AA bargaining unit employees park their cars. AA managers park their cars within the fenced area.

6. A bargaining unit employees enter and exit the facility through a turnstile which allows them through the fence. In order to enter, they must swipe an AA supplied security card which also acts as the method by which AA records the hours of work of its employees. The turnstile, which can be used by AA employees day and night, is located some distance from the location where the guards are normally situated. There is no security guard located at the turnstile. In general, security guards do not know if or when particular employees are coming and going.

7. There is also a gated vehicle entrance and exit through the fence to the plant. There is a guardhouse, where the guards are based, located at this entrance. Management employees drive their cars through this entrance to park in their parking lot. In addition, other vehicles, such as delivery trucks and visitors also may enter through this entrance. All vehicles which enter the facility through the vehicle entrance stop at the guardhouse to check in with the Hawthorne security guard(s). Visitors must have an appointment to be allowed access.

8. Hawthorne employs a total of six security guards and one supervisor to provide security for AA. There is at least one guard at the facility 24 hours per day, seven days a week. While there are periods during business days when there are two guards (4am -noon and 4-10:30pm), at all other times, including weekends, there is only one guard on duty. At one time there were more guards, but with the installation of the security fence and turnstile security system following the attacks on the World Trade Centre, the numbers were reduced.

9. Robin Brent, who testified for Hawthorne, testified that the guards provide security for the whole facility and give every person, whether a visitor, manager, or AA bargaining unit employee, the same scrutiny in order to protect AA's interests. Broadly speaking, guards perform functions in two ways. First, they perform a variety of functions in the guardhouse. Second, they conduct patrols throughout the AA facility.

Guardhouse Functions

10. In addition to checking vehicles driven by management, delivery agents and visitors, guards assist AA bargaining unit employees who attend at the guardhouse for a replacement security card if they have lost or forgotten theirs. The AA employee shows identification and then is provided with a replacement card. In theory those employees are supposed to then go through the turnstile. They may, however, enter the facility on foot through the vehicle gate. AA bargaining unit employees may also attend at the guardhouse if they need to remove property from the facility in a process which is described in detail below. The vast majority of AA employees do not forget their identification badges and therefore have no contact with the guards when they enter the facility.

11. Guards also monitor images captured by a number of video cameras which provide a view of the outside of the facility including the security fence and the bargaining unit employee parking lot. There is a computer screen in the guardhouse which allows the guard to view all of the images caught by the cameras. The guards can either view all of the cameras at one time or enlarge the view of one camera so that it fills the whole computer screen. A guard can also operate a camera to focus on a particular area or to pan out to view a wider area. Normally, as the cameras are focused only on the security fence and the employee parking lot, employees are not seen on the computer screen except when they are in the employee parking lot going to and from their vehicles. Whatever image is on the computer screen is recorded. There are times, however, where for long stretches one or more cameras is not functional.

12. The security cameras were not installed because of terrorist related security concerns. They were installed in 2001 at the request of the union because employees' cars parked in the employee parking lot were being vandalized and broken into. The union was also concerned about female employees walking through the parking lot at night. In fact, the President of Local Lodge 1542, Gary Scholl testified that he took charge of the installation project. He was the one who actually researched and recommended an appropriate camera system. He made a presentation to management. Following the union's recommendation, Boeing bought and installed the system, which has been expanded since then.

13. There was some sort of agreement between the union and AA that the cameras were not to be used for disciplinary purposes. However, the exact details of the agreement are difficult to describe with any certainty. In cross examination Mr. Scholl acknowledged that if a camera were to record an AA bargaining unit employee engaged in serious misconduct then the video could probably be used as evidence against him. However, it could not, in his view, be used for lesser discipline such as smoking violations.

14. If a guard sees something on the screen which has been caught by the camera, including an AA employee, and which looks suspicious, they monitor the situation. If the guard is concerned they would call the police; they would not approach themselves. A concern is that AA property will be left at the fenceline by AA employees so that it might be retrieved later. If the guards would ever spot such property they would report it to AA. The guard does not deal with the situation beyond that.

15. No employee has ever been disciplined as a result of anything that was seen on a camera.

16. Guards also receive telephone calls from AA employees who are late or absent from work. The guard then passes that information to human resources. The guard is a mere conduit for this information. It is AA which decides what, if anything, to do with the information. Guards sign for courier packages and collect newspapers which are delivered.

17. In addition, as noted above, guards have a special role to play when employees take AA property out of the facility. Normally, guards do not inspect cars driven by managers or guests as they leave the enclosed area of the facility. Nor do they inspect the cars of employees which are parked in the employee parking lot.

18. However, when an AA employee has received a supervisor's written permission to take AA property out of the facility the process is as follows. The employee will present written authorization signed by an AA supervisor to the guard. The guard will then permit the employee to drive his/her vehicle into the facility and the employee will load the AA property into his/her car. The guard will then visually inspect the car and, if it is satisfactory, the employee will be permitted to drive away.

19. If on the inspection the guard finds something that looks like AA property, other than that which was authorized, the procedure is that the guard will question the employee and obtain an explanation. If it is questionable who owns the property, the guard will let the employee leave and then document it. If the employee acknowledges it is unauthorized AA property, the guard will remove the property and report it to AA. This has happened occasionally.

20. Guards do not search vehicles if there is no property removal authorization slip. They also do not search AA employees' lunch boxes or personal belongings. The guards do essentially nothing to prevent AA employees from removing AA property through the turnstile. Despite the security procedures, the Board heard some evidence that there has been considerable theft at the facility.

21. Security guards do somewhat different duties during the day than they do at night and on weekends, primarily because there is much less vehicular traffic during the off hours. They do control after hours vehicle access to the facility. However, employees enter as normal through the turnstile, generally without guard involvement. Guards also spend about eight hours of their twelve hour weekend night shift in the guardhouse.

Patrols

22. Guards conduct three patrols during the day. One guard stays in the guardhouse while one is on patrol. Patrols usually last one hour. On nights and weekends guards conduct four patrols for a twelve hour shift.

23. On day patrols guards engage in the following activities:

- Patrol the employee parking lot.
- Walk through the plant and monitor "comings and goings".
- Advise AA of health and safety issues or whether something needs repair
- Patrol the employee parking lot.

24. After hours guards conduct four patrols for approximately one hour each. In each of these functions they have the following duties:

- Turn off lights, check gas gauges, ensure doors are locked where required.
- A key control function occurs primarily after hours. The guard has keys that open everything in the facility. A guard will provide an AA employee with a key on direction from an AA supervisor. If a key is not returned, the guard reports that fact to AA. Before doing so the guard will call the person who was given the key and ask where it is.
- Examine forklift propane gas tanks to ensure they are turned off. If they are not turned off, the guard will report that to AA.
- Examine fire panels.
- Look out for health and safety issues.
- Monitor garbage levels and waste tank gauges.

25. If a guard saw an AA employee in a place where they were not supposed to be, the guard would monitor the situation and "see how it unfolded". The guard would report the incident to AA.

Other Duties

26. Guards also have a role in emergency situations. It is the responsibility of guards to notify the correct agency in case of an emergency whether that be police, fire, ambulance or the Ministry of Labour. When the responders arrive, the guard opens the gate for them, fills them in on the situation and may escort them to the location where the emergency is occurring. Guards would also coordinate the evacuation of the plant if necessary, as where there is a power failure.

27. There has never been a strike at AA Boeing. However, Mr. Brent attended a meeting during the last round of collective bargaining and the guards were going to have some role in the employer's response in any strike.

28. Mr. Brent testified that the guards monitor everything. They are on the look out for any type of abnormal activity. He acknowledged that the guards do not supervise, discipline or direct the work of AA employees. Guards do not exclusively watch AA employees. They give everyone the same degree of security importance. They are there to keep the plant safe with no exceptions.

Miscellaneous Facts

29. There have been two occasions where Boeing engaged in covert surveillance on AA employees. In neither case did Hawthorne conduct the surveillance. Mr. Brent testified that on the first occasion Boeing was not aware that Hawthorne provided that service. On the second occasion Hawthorne management (not its guards) consulted with Boeing, but Boeing again used the same firm that had provided the surveillance in the first instance. Hawthorne has made AA

aware of its capabilities. Mr. Brent testified that if they were asked to provide covert surveillance in the future the guards could be involved.

30. Guards do not monitor alarms at the facility. Those are monitored by an outside alarm company.

31. The president of Local Lodge 1542 (the Local which represents the AA bargaining unit employees) was the scrutineer for the applicant in this application. The union led evidence that, if it was certified to represent the guards, it might place them in a different local lodge than the AA employees. However, the decision has not yet been made.

32. It was the evidence of Mr. Brent that guards are required to and do report anything abnormal to AA management. This might in theory include anything from employee misconduct to health and safety issues. However, there is no dispute that in the many years that Hawthorne has provided security service to Arnprior Aerospace and Boeing there has never been a single instance of a guard doing anything which resulted in the discipline of a bargaining unit employee. On the other hand, reports by other fellow AA bargaining unit employees have frequently resulted in disciplinary action being taken by AA.

33. The Director of Human Resources at AA wrote Mr. Brent a letter giving AA's position if the applicant is certified. The union objected to the introduction of the letter in the absence of the calling of the author of the letter as a witness. However, the union sought to rely on the letter in final argument. I find the letter is hearsay evidence, and irrelevant and I give it no weight.

Decision

34. Section 14 of the Act states:

> **14.** (1) This section applies with respect to guards who monitor other employees or who protect the property of an employer.
>
> (2) Unless the employer notifies the Board that it objects, a trade union that admits to membership persons who are not guards or that is chartered by or affiliated with an organization that does so may be certified as the bargaining agent for a bargaining unit composed solely of guards.
>
> (3) Unless the employer notifies the Board that it objects, a bargaining unit may include guards and persons who are not guards.
>
> (4) If the employer objects, the trade union must satisfy the Board that no conflict of interest would result from the trade union becoming the bargaining agent or from including persons other than guards in the bargaining unit.
>
> (5) The Board shall consider the following factors in determining whether a conflict of interest would result:

> 1. The extent of the guards' duties monitoring other employees of their employer or protecting their employer's property.
>
> 2. Any other duties or responsibilities of the guards that might give rise to a conflict of interest.
>
> 3. Such other factors as the Board considers relevant.
>
> (6) If the Board is satisfied that no conflict of interest would result, the Board may certify the trade union to represent the bargaining unit.

35. There is no dispute that clause 1 of s. 14(5) does not apply as the Hawthorne guards do not monitor other Hawthorne employees and do not protect Hawthorne's (their employer's) property. Nevertheless, paragraph 1 is significant because it suggests that where the Legislature was concerned enough to actually identify specific duties and the circumstances which might give rise to a conflict of interest (that being where the guards are the employees of the employer being guarded and they protect *their* employer's property or monitor *their* employer's property) a conflict of interest does not automatically arise. The Board is still required to examine the "extent of the monitoring". This suggests that even in those circumstances, certain levels of monitoring may not give rise to the kind of conflict of interest covered by s. 14. This point was discussed by the Board in *Old Oak Properties Inc.*, [1996] OLRB Rep. July/Aug. 648:

> Even on that one factor, i.e., the guard's monitorial authority, the new Act has significantly altered the assessment. In case law under old section 12 and under the language of Bill 40's section 6(6), the Board simply looked for the existence of "monitorial" authority. Bill 7's language requires the Board to assess "the *extent* of the guard's duties monitoring other employees of their employer". It suggests a gradation in monitorial duties, and that some degree of monitorial duties may give rise to a conflict of interest while some may not. Counsel for the Labourers argued that "monitoring" duties must include, at a minimum, a role in admonishment or warning of those monitored. While this may reflect one of the 'degrees' of monitorial authority contemplated by paragraph 14(5)1, I am not convinced that it is the only sort contemplated in the new scheme. Without doubt, a role in admonishing those whom one guards amounts to a greater degree of monitorial authority.

36. Significantly, the Act does not specifically address circumstances where the guards are protecting the property or monitoring the employees of another employer. Instead, such circumstances are to be analyzed with regard to the factors set out in clauses 2 and 3 of s.14(5). The fact that the Legislature did not specifically identify duties which might cause a conflict of interest where the guards are guarding another employer suggests that there may not be the same concern in such circumstances. The reason for that is a practical one. In the circumstances caught by paragraph 1, the employer may have a difficult time dealing with conflict of interest because potentially all measures which could be put in place to reduce the conflict are subject to the agreement of the union. On the other hand, if the guards are employed to protect a client of their employer (as in this case) the client may be able to deal with problems that arise out of a conflict of interest by simply cancelling or not renewing its arrangement with the security company.

37. Even though this case does not fall under clause 1 of s. 14(5), the parties concentrated the bulk of their evidence and argument with respect to the extent of monitoring the employees of AA and to a lesser extent with the extent they protect the property of AA.

38. It is clear to me that the vast bulk of security guards' time is spent in non-monitoring activities which gives rise to no possible conflict of interest because there is no contact with employees. A substantial amount of guards' time is spent in the guardshack. Primarily, guards are doing one of five things:

1) controlling vehicular traffic flow into the facility. This does not involve the monitoring of employees.

2) answering telephone calls from employees who are late or absent. Although the employer argues that this amounts to monitoring or creates a conflict of interest, I disagree. The guard's function is simply a conduit of information from the employee to human resources. The guard can do nothing to help the employee by, for example, changing the explanation for the absence (as Hawthorne suggests) because that would not be of assistance to the employee. Guards play no role in whatever AA does with the information.

3) monitoring the images caught by the security cameras. There is no doubt that this is the kind of activity that could amount to monitoring of employees. However, it is not really so in this case. The cameras are focused on the employee parking lot and on the security fence. There is no camera coverage of employee work areas. When the guard looks at the parking lot image he/she is monitoring cars, not employees. If the camera caught an image of vandalism there is no evidence before me that the security guard would be able to identify the individual from the image. The cameras focused on the fence have a similar purpose. Finally, there is the agreement between the union and AA (as vague as it is) which was clearly meant to limit the possibility that cameras could be used against employees. In any event there is no suggestion that a guard has ever seen an employee on the camera doing anything improper.

4) handing out replacement security badges. There is no suggestion that it is improper for employees to lose or forget their card or that there could be any negative consequence for them doing so.

39. The duty which causes the Board the most concern is the guard's obligation to search an employee's vehicle when they obtain written permission to take company property and drive their cars into the fenced-in areas for that purpose. I am satisfied that this duty is not sufficient on the facts of this case to create a conflict of interest within the meaning of section 14.

40. There is no doubt that if guards are required, as part of their duties, to search an employee's personal effects or vehicle, the Board may well be concerned that a conflict of interest could result if the trade union were certified. In fact, such duties were the kind of responsibility which, prior to the Bill 40 amendments to the Act, frequently led to the Board finding a conflict and ordering that guards could only be represented by guards unions. (See for example, *Corby Distilleries Limited*, [1980] OLRB Rep. February 194.)

41. Having said that, the Act has been changed since the Board decided *Corby Distilleries*. Under the previous jurisprudence there was a relatively strict standard. Now, as the Board stated in *Old Oak, supra* at para. 109 "…some degree of monitorial authority may give rise to a conflict of interest while some may not". Under the new statutory provisions, the Board examines the extent (the frequency) to which such duties are exercised in order to determine whether a conflict would result. In this case, the evidence is that the removal of AA property from the facility is a relatively infrequent occurrence. It is also significant that no employee has ever been disciplined as a result of a guard exercising property control duties. Finally, the requirement that employees have written authorization from an AA supervisor to remove AA property added to the fact that there is no guard at the turnstile, lessens any conflict concerns; it suggests that the guard is exercising a checking or inventory control function more than a searching function. In this case, had the evidence been that the guards were more often involved in searching or that discipline ever resulted from such duties, my conclusion may well have been different. However, in the specific facts of this case I conclude that there would no conflict of interest arises out of this duty.

42. If anything, there is less monitoring or other duties which could raise conflict of interest concerns on patrols than when the guard is in the guardhouse. The main functions on patrols include such essentially custodial functions as turning off lights, checking gauges and panels and the like. These are not employee monitoring functions. The fact that a guard may be required to tell an employee to leave a particular area is not a significant conflict issue in my view. Similarly, the guards' duties with respect to the provision of keys is more of a custodial function. There is no evidence that the guards' have any obligation to enquire of the reason the employee needs the key; the employee's right to the key is assumed by the supervisor's approval.

43. It would always be possible that a guard will see an AA bargaining unit employee engaged in wrongdoing (although there is no evidence that it has ever happened). The guards' duty is to report the employee. However, the guards' duty is no different from the duty imposed on any employee. They have no special duty that amounts to monitoring of employees. In this regard the factual circumstances are nearly identical to those of the guards in *Old Oak*, supra where the Board stated:

> 128. Beyond that general point, Old Oak argued specific aspects of the relationship of Old Oak guards and Martin's cleaners. In Old Oak's contention, guards have an indirect role in discipline of cleaners because they monitor cleaners to ensure that they are not doing things that they should not be doing and because guards log incidents that could lead to discipline. Even if one characterized the guards' role in the fashion suggested by Old Oak, I am not persuaded that it results in a conflict on the facts of this case. First, I note that there were no examples of a guard report leading to discipline of cleaners, and no example of a requirement that guards testify in any forum against cleaners. Second, and more significantly, the guards' monitorial function in respect of the cleaners is far from intensive. I was not convinced that guards have any greater role in monitoring cleaners' activities than those of other persons in the buildings after business hours. While the guards may come across cleaners in the course of their patrol rounds, the same is true in respect of tenants and their guests who may be on the premises after business hours, and contractors who may be working on site. The guards perform no strict monitorial role in respect of either category of persons.

> 129. The evidence does not disclose that guards have some preventive role in ensuring that cleaners follow security rules. Although guards will take action where cleaners leave elevators unattended or fail to lock a tenant's doors, this occurs by chance in the midst of regular patrols. Guards have a role in ensuring that the building is secure. While cleaners might be responsible for a security breach, so might a tenant or maintenance staff. The guard has no particular duty that amounts to supervision of the cleaners. In fact, the patrol guards make no special effort to check on cleaners, despite the special access that cleaners have to the building through use of their own keys. And where guards have had problems with cleaners (e.g., allowing someone without an access card into the building after business hours), the guards have acted without hesitation as they presumably would have in the case of security breaches that did not involve a fellow union member.

44. I also do not accept that the fact that Hawthorne has the capability to perform covert surveillance which capabilities might be engaged by AA in the future has any relevance. Of course the employer could come up with a whole variety of duties which the guards have never performed and which might give rise to a conflict. If the Board were to permit such "evidence" to influence its decisions, s.14 would lose all meaning. In my view s.14 is concerned with present duties and responsibilities, not speculation about what duties might be given to guards in the future.

45. In my view an assessment of the degree of monitoring is influenced by the geography of the workplace. This is a large plant with many employees. Yet there are only two guards at most on duty at any one time. In the absence of a video surveillance system vastly different than the one in place, it is almost impossible to conceive of any way that the guards could effectively monitor AA employees. In fact they have many other duties which they are required to perform that also inhibit that ability. The truth is that all monitoring of AA employees is incidental to the guards' regular duties.

46. The Legislature did not see fit to bar employees from being represented by a union which also represents the employees of the employer being guarded. In fact, the Legislature did not bar them from being in the same bargaining unit or being represented by the same union even where they are all represented by the same employer. If the Board were to adopt the kind of analysis advanced by the employer a guard unit would never be certified in such circumstances. Of course, it might always be the case that a guard might not do something he/she was supposed to do so as to help out a union member. That is the case regardless of what the duties of the guards are. But that possibility, so long as it does not give rise to the kind of conflict of interest contemplated by s.14, is not enough to deprive employees of their choice of union. Were it otherwise, the Legislature could simply have said so.

47. In total, I am satisfied that the duties performed by the guards, whether examined individually or collectively, do not give rise to a conflict of interest under s. 14 of the Act. This conclusion is supported by a stark fact: in the many years that Hawthorne has provided guards to AA and Boeing nothing the security guards have done has ever resulted in any discipline, discharge, or any negative impact on AA employees. There can be no better evidence of the absence of meaningful conflict of interest as of the type prohibited by s.14 of the Act.

48. Accordingly, the union has demonstrated that if it is certified as the bargaining agent for these guards, no conflict of interest will result.

49. Having regard to the agreement of the parties, the Board further finds that the following constitutes a unit of employees of the responding party appropriate for collective bargaining:

> all employees of Hawthorne Security & Communications Inc. in the Town of Arnprior, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff.

50. A certificate will issue to the applicant.

51. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before then.

3479-05-U International Union of Bricklayers and Allied Craftworkers, Local 25, Applicant v. **International Union of Bricklayers and Allied Craftworkers**, Responding Party.

Alteration of Jurisdiction – Construction industry – Trade Union – Trusteeship – After a local union withdrew from various programs of its parent union and took steps to affiliate itself with a rival union, the parent revoked the local's charter – The local claimed that the revocation violated sections 147 and 149 of the *Act* – The Board held that section 149 had no application as the parent did not attempt to retain any of the legal or institutional attributes of the local – A parent union is entitled to sever its relationship with a local, subject only to the just cause requirement of section 147 – The Board is not likely to weigh the merits of the parent's decision as long as it severs the relationship completely and does not do so for a coercive or punitive motive – The revocation of the charter would harm viable and stable collective bargaining and cause serious labour relations problems because (i) no collective agreement would apply to the geographical area under the local's jurisdiction and (ii) it would unravel a previous order made by the Board that prevented the irreconcilable differences between the parties from disrupting the entire construction industry and inflicting significant damage to the economic interests of both employers and members of the union – The parent would not be able to demonstrate just cause for the revocation of the charter unless it simultaneously took steps to transfer the rights, privileges and duties of the local to the employee bargaining agency – The Board found that the parent acted without just cause and declared the attempted revocation to be null and void

BEFORE: *David A. McKee*, Vice-Chair.

APPEARANCES: *L.A. Richmond* and *R. Eade* for the applicant; *Bernard Fishbein* and *R. Graeme Aitken* for the responding party.

DECISION OF THE BOARD: February 19, 2007

1. This decision deals with an application made by the International Union of Bricklayers and Allied Craftworkers, Local 25 ("Local 25") alleging that the International Union of Bricklayers and Allied Craftworkers (the "IU" or the "parent union") has violated sections 147 and 149 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, as amended (the "Act") when it revoked the Charter of Local 25 on January 5, 2006. The IU asserts that it had just cause to revoke the Charter, and that in any event, it had not violated the Act by terminating its relationship with the Local Union that, in its view, had decided to disaffiliate from the IU.

Background

2. The background of this conflict is lengthy. There are numerous Board decisions dealing with it. A more complete chronology (if a lengthy one) can be found in the decisions involving these parties reported at [1999] OLRD 2470, Board File No. 2532-98-U (May 12, 1999); OLRB Rep. July/Aug. 621; [2000] OLRB Rep. Sept./Oct. 891 (September 15, 2000), [2001] OLRB Rep. May/June 615 (May 2, 2001); and finally [2004] OLRB Rep. Mar./Apr. 193 (April 21, 2004). A brief summary of this dispute is as follows.

3. There has been an ongoing conflict between the IUBAC and Bricklayers in Ontario since about 1995. At some point in the late 1990's the Ontario Locals of the IU decided that they wanted independence from their parent union. This view commanded the loyalty, first of the elected officers and ultimately of the majority of members of IU Locals in Ontario in all but three areas: Thunder Bay (Local 25), Windsor (Local 6), and Ottawa (Local 7). Those seeking independence founded the Brick and Allied Craft Union ("BACU") which is, in fact, a rival trade union seeking to supplant the IUBAC in Ontario.

4. The BACU created a structure that was essentially the mirror image of the IUBAC, and the Ontario Provincial Conference of the IUBAC ("the OPC") as a central body, and BACU locals that mirrored the Local Unions of the IUBAC in Ontario. The officers of the OPC became the officers of the BACU and held both offices at the same time. The officers of each Local Union became officers of both the IU Local and the BACU Local. One effect of the freeze during the litigation which produced the above-noted decisions was that the BACU was able effectively to run the Locals in Ontario (except for Locals 6, 7 and 25) and gradually drain the IU Locals and the OPC of any independent existence. The BACU and the OPC entered into a "Servicing Agreement", as did each of the IU and BACU Locals (again other than Locals 6, 7 and 25). Essentially, all control and all revenue flowed to the BACU. The BACU used the name of the OPC or of the IU Local Union only when it was necessary to do so. Membership in "the Union" became membership in the BACU. The membership of each IU Local Union shrank to ten or fewer people who were the Executive Board of each Local. They maintained their membership in the IU (and simultaneously their membership in the BACU) solely for the purpose of maintaining a Local Union in existence so that it could rely on the bargaining rights of the OPC or of the IU Local when necessary

5. Before 1998, the OPC and the IUBAC were named jointly as the employee bargaining agency in the Ministerial designation under section 153 of the Act. In 1998 the OPC displaced itself and the IUBAC as employee bargaining agency under section 154. Thus the OPC (and through it, the BACU) controlled provincial bargaining.

6. In the various applications before the Board, there was a series of four outcomes:

(1) The BACU sought to have the Board declare that it was the successor to the IUBAC and had successfully displaced the IUBAC in Ontario. In that endeavour, it was not successful.

(2) The Ontario Locals of the BACU next sought independence from the IUBAC as a remedy for the various violations of the Act by the IU. In this, they were not successful, although the Board granted extensive remedies which severely limited the ability of the IU to operate in Ontario.

(3) Locals 6, 7 and 25 filed various complaints against the OPC, alleging it had violated sections 147 and 149 in the manner in which the OPC treated those three Local Unions in bargaining and in a number of other ways. The OPC is a parent union to Locals 6, 7 and 25. The Board found that the OPC had violated the Act and ordered numerous and extensive remedies.

(4) Finally, in 2004 the BACU sought to displace the IUBAC by straightforward applications for certification displacing or "raiding" the OPC and the IU locals. Slightly more than 100 of these applications were filed and the great majority of them were successful.

7. This left a potentially impossible situation in the Province. The BACU represented a majority of bricklayers at work in the Province. The BACU had in fact created a province-wide collective agreement (with limited application in Windsor, Thunder Bay and Ottawa) over the previous five years. The bargaining rights the BACU acquired in the displacement applications did not fit neatly into that province-wide collective agreement, since they did not match those of the OPC and IU Locals at all. Because the BACU was not an employee bargaining agency, the certificates that it received were limited to a single Board Area. Therefore, the bargaining rights it acquired did not match those of the OPC in the following instances:

(1) In the successful displacement applications the employees of an employer were for the most part working in one or two Board Areas. Thus the certificate covered only a small part of the Province, and perhaps not all of the employer's actual geographic area of operations.

(2) No displacement application could be made in respect of bargaining rights for employees of contractors not at work from February 1, 2004 to May 1, 2004;

(3) A small number of contractors whose employees had voted against the BACU; and

(4) The BACU could not bring applications in respect of bargaining rights for employees of general contractors where the bargaining rights had been established by the OPC at some time in the past, but who never hired bricklayers directly, preferring to have the work performed by subcontractors.

Thus, the OPC and the IU Locals continued to hold bargaining rights with respect to a significant number of employers and general contractors in the Province of Ontario. Nonetheless, the reality was that the BACU still controlled the OPC and would control bargaining. The BACU could not, however, displace the OPC entirely as the OPC and the IU Locals held bargaining rights that the BACU had not acquired or could not, for practical reasons, hope to acquire. Given the timing of the "open period" every three years and the position of general contractors, this was unlikely to change quickly.

8. Locals 6, 7 and 25 were also in a difficult position. They could not control provincial bargaining, but had suffered considerable damage from the unfair labour practices committed by the OPC over an extended period of time. The remedies awarded in the 2004 decision were to compensate for those past damages, but the Board specifically refrained from fashioning any remedies which would apply to the future relationship among the Ontario locals. Rather, it left the parties to attempt to negotiate what the terms of engagement would be.

9. An agreement was reached by Locals 6 and 25 with the OPC and BACU. The IU was not seriously involved in these discussions and Local 7 ultimately concluded it would not join them. When the matter returned to the Board, I accepted the terms of that agreement and created an Order which was identical to the agreement in a decision dated August 31, 2004 (the "2004 Order"). Essentially, the agreement was endorsed in respect of Locals 6 and 25 and was used as the remedy for Local 7. The BACU and OPC would remain entitled to control provincial bargaining, but Locals 6, 7 and 25 were protected from improper interference and were provided with certain channels of communication.

10. There are two provisions of the Order that were of significance in argument. These are as follows:

> 2.3 The parties agree and the Board orders that the territorial jurisdiction of [IUBAC] Locals 6, 7 and 25 under the collective agreements and this Agreement shall be the traditional jurisdiction enjoyed under the OPC agreements.
>
> 2.9 For the period that this agreement order is in effect [i.e. until February 1, 2010] *there shall be no new IU Local Unions or BACU Local Unions chartered* or recognized as having any rights under this agreement or the collective agreements. No changes to the jurisdiction of BACU or IU Locals shall be recognized under this agreement or the collective agreements without the written consent of Locals 6, 7 and 25, as well as the OPC and the BACU. This does not prevent any IU Locals or any BACU Locals that are parties to this agreement from merging.

11. A question arose in the argument of this case as to what extent the IU was a party to this Order. Given that it was not a party to the agreement, but like Local 7, it was party to the litigation that led to the 2004 Order, it would appear that it is bound by that Order. Certainly, paragraph 2.9 would be of no effect if it was not binding on the IU. The question then becomes to what extent the IU would be entitled to enforce any provision of the 2004 Order against the BACU or other Ontario Locals or the OPC. However, no party has asked the Board to come to any conclusion about these issues. It was relevant to the case in terms of the parties' perception, but no party asked the Board to fashion a remedy for an alleged violation of the 2004 Order.

Actions of Local 25 after 2004

12. After the 2004 Order, Local 25 began to develop better relations with the BACU and the OPC. In fact, it reached some fairly fundamental form of accommodation with them. It began to withdraw from various programs of the IU one step at a time (the members' pension plan, attending conventions, and so on). On July 23, 2005 it purported to withdraw from the officers' and employees' pension plan (the "LOEPF"). Again, there is a dispute about whether

any IU Local Union is entitled to do so. The IU said that it was not. Local 25 argued that it was. I need come to no conclusion. In December of 2005, the IU received a copy of the newsletter published occasionally by the BACU. This contained a story on page 1 which states in part:

> "On December 1 the membership of Local 25, Thunder Bay, voted unanimously to accept a BACU charter at a *special called meeting of the Local*.
>
> This is the first *newly chartered* local union since the BACU formed a convention in 1998 that brings into the fold a local which represents the Northwest of Ontario bordering with Manitoba and eastward to the area served by Local 29, Sault Ste. Marie, covering the largest geographical region in the province".

The IU questioned whether such action was appropriate at a membership meeting of a Local Union of the IUBAC and, more importantly, if the "newly chartered" Local had been chartered contrary to section 2.9 of the 2004 Order. Again, the IU did not ask the Board to come to any conclusion on this point. Counsel for Local 25 said that the charter was not a new one but had been "dusted off, updated and given" to the Thunder Bay members. The difference between what the BACU calls a new charter and the manner in which counsel would describe it need not be determined in this proceeding.

13. In December 2005 the arrears of members' dues from Local 25 were cleared up. However, they were paid by cheque drawn on an account maintained by the BACU.

14. The IU took all of these facts as an indication that Local 25 sought to disaffiliate from the IU. Indeed, it argued that the acceptance of a BACU charter was equivalent to seeking disaffiliation from the IU. Whatever else it was, the acceptance of the BACU charter was not an act of disaffiliation. People can do contradictory or internally consistent things, seeking to have the advantages of both choices. Counsel was being more accurate when he said that the IUBAC had decided that the IU Local 25 membership had turned its back on the International and that the IUBAC decided "enough is enough".

15. The IU's position is that it contemplated various actions, including litigation under the 2004 Order, but concluded that if in fact the members of Local 25 wanted to leave the IU and join the BACU, the IU would do nothing to stop them. It anticipated that the membership of IU Local 25 would shrink to 10 members (a fact which both counsel took as true for the purposes of argument). It had no desire at all to continue or to commence yet another relationship with a "sham" Local Union. On January 5, 2006, it wrote to the Local Union rescinding the Charter of Local 25. The full text of that letter is worth reproducing:

> "The International Union Executive Board has been advised that on December 1, 2005, Local 25 Ontario ("Local 25") effectively disaffiliated from the International Union by membership vote. That action followed earlier actions by the local indicating intent to disaffiliate from the International Union including refusal to remit mandatory contributions to the Local Officers' and Employees' Pension Fund ("LOEPF"), refusal to remit dues and related abstention from the recent Convention.
>
> Local 25's unequivocal intent to disaffiliate and its actual disaffiliation is clear. Although the International Union Executive Board regrets the decision of the Local 25 membership, we must accept it and there are practical matters that must be

> addressed. The International Union Executive Board therefore formally acknowledges Local 25's disaffiliation.
>
> Accordingly, as of December 1, 2005, the Local 25 charter, is null and void and without force and effect. The status of Local 25 as an affiliated local union of the International Union of Bricklayers and Allied Craftworkers is terminated as of that date".

16. This application was filed on January 18, 2006. Pursuant to subsection 147(5) of the Act, the alteration (in this case dissolution) was deemed not to have been effective until the Board had disposed of the matter, as it does in this decision.

Application of the Act to this case

17. This application was filed under sections 147 and 149 of the Act. These sections provide as follows:

> **147.** (1) A parent trade union shall not, without just cause, alter the jurisdiction of a local trade union as the jurisdiction existed on May 1, 1992, whether it was established under a constitution or otherwise.
>
> (2) The parent trade union shall give the local trade union written notice of an alteration at least 15 days before it comes into effect.
>
> (3) On an application relating to this section, the Board shall consider the following when deciding whether there is just cause for an alteration:
>
> 1. The trade union constitution.
>
> 2. The ability of the local trade union to carry out its duties under this Act.
>
> 3. The wishes of the members of the local trade union.
>
> 4. Whether the alteration would facilitate viable and stable collective bargaining without causing serious labour relations problems.
>
> (4) The Board is not bound by the trade union constitution when deciding whether there is just cause for an alteration.
>
> (5) If a local trade union makes a complaint to the Board concerning the alteration of its jurisdiction by a parent trade union, the alteration shall be deemed not to have been effective until the Board disposes of the matter.
>
> ***
>
> **149.** (1) A parent trade union or a council of trade unions shall not, without just cause, assume supervision or control of or otherwise interfere

> with a local trade union directly or indirectly in such a way that the autonomy of the local trade union is affected.
>
> (2) A parent trade union or a council of trade unions shall not, without just cause, remove from office, change the duties of an elected or appointed official of a local trade union or impose a penalty on such an official or on a member of a local trade union.
>
> (3) On an application relating to this section, when deciding whether there is just cause, the Board shall consider the trade union constitution but is not bound by it and shall consider such other factors as it considers appropriate.
>
> (4) If the Board determines that an action described in subsection (1) was taken with just cause, the Board may make such orders and give such directions as it considers appropriate, including orders respecting the continuation of supervision or control of the local trade union.

Counsel directed all of their argument to section 147. Local 25 asserts that section 149 also applies to the facts of this case, but did not suggest how it might be so. For reasons set out below, I conclude that only section 147 is engaged by the facts of this application, and I analyze it only in that context. One must recognise, however, that the facts of this case are quite unusual. Sections 147 and 149 are usually applicable to the disputes that may arise between a local union and a parent union in the ongoing course of their relationship. The situations where a parent union determines that it wishes to dissolve a local union and all of its rights and attributes, will, of necessity, be rare.

18. There may well be times when an international union is justified in dissolving a local union. If the membership has fallen to such a low point that it cannot function as a local union, if internal disputes are such that the local will never be able to function effectively at any time in the foreseeable future, or if a local has fallen into such disarray that it is impossible to revive a functioning local union, then it may be necessary to dissolve the local union entirely. All of these scenarios imply that the international union still maintains an interest in having an institutional presence or continuing to represent certain persons in a particular geographic area. Generally, such action will be accompanied by a granting of jurisdiction to another union (if not an outright merger), or finding some other form of institutional representation in the area. In such a case, both section 147 (the alteration of jurisdiction by dissolving the local union) and section 149 (the interference with autonomy by decreeing a different future for the local union, or for some constituent parts of the local union) would be engaged and the IU would be required to demonstrate just cause under both sections, both for the decision to dissolve the local and the solution for continuing to represent members on a "going-forward" basis.

19. The IU in this case did not assert any such desire. It concluded that the membership of Local 25 had decided to quit the IU, and that this was a decision the IU was prepared to accept. As counsel for the IU put it, the IU said in effect "if you want to go, go". If that is all that the IU has done, then I conclude that only section 147 is engaged. It has certainly altered the jurisdiction of Local 25 by eliminating it, but if it has no plans to do anything with any legal right or attribute of the Local, it is not possible to talk about interfering with its autonomy by controlling its present or future actions.

20. I asked counsel what the IU's plans were for the future; for example, was the IU prepared to treat north-western Ontario as a blank space on its map of North America, or did it plan to organize a new and rival organization free of any ties to the BACU? Counsel stated, and I accept, that given the vagaries of litigation among these parties over the past 10 years, the IU had determined that there was no point in making plans for the future. It had determined simply that it would await the outcome of this application and then decide what to do.

21. Given that no party has ever received exactly what it hoped for from any of this litigation, this statement strikes me as highly probable. No doubt the IU has a number of tentative ideas, but has not likely developed its thinking on any of them. I conclude therefore that this revocation of Local 25's Charter should be treated as what it is on its face: the dissolution of a local union because the relationship between it and its parent union has ceased to have any meaning, and that the IU has dissolved the Local without attempting to retain any of the legal or institutional attributes of that Local Union. In this case, only section 147 is engaged and I propose to analyze it in that context only.

The Right to Dissolve a local union

22. The act of dissolving a local union because the parent union has no interest in a continuing relationship with the local or its members is not, per se, a violation of section 147, although the circumstances surrounding how the parent union does it may require close scrutiny. No union is tied to an endless and unproductive relationship with a group of employees or members. In the earlier decisions referred to above, the act of the IUBAC in dissolving the eleven Ontario Locals and the OPC was found to be a violation of the Act. Its purpose in revoking the charters of the OPC and the local unions was to force its will on the Ontario members by use of its constitutional power. It did not leave the field behind. It promptly set up eleven new local unions to supplant and replace the locals it had dissolved. The Board found that it had done so without just cause, and declared the revocations void.

23. That situation is not analogous to the facts of this case. In this case, the IU simply asserts the right to terminate an unproductive relationship with no other consequences or expectations. The Board has found that a trade union is entitled to abandon its right to represent employees in similar circumstances. In *Aloia Bros. Concrete Contractors Inc.*, [1999] OLRB Rep. Mar./Apr. 127, the Board was faced with an assertion that a local union had abandoned its bargaining rights for a group of employees. The employer had asked for a ministerially-supervised final offer vote and it appeared likely that the union would be forced to sign a collective agreement that would break the "pattern agreement" it had negotiated for that area of the industry. Rather than accept that outcome, the union was prepared to walk away from its relationship with the employees and the employer. It severed all form of legal relationship completely. The Board found that it was entitled to do so and said at paragraph 94:

> 94. Bargaining rights refer to the relationship between the *trade union* and the *employee* members of a bargaining unit. The union is the bargaining agent for the employees. It is an "agency relationship", and there is no employer ownership of, or participation in, that relationship. Indeed, under section 70 of the Act, the employer is specifically forbidden to "participate in or interfere with the formation, selection, or administration of a trade union *or the representation of employees by a trade union*". Nor does the employer have a veto over whether the union does or does not continue to represent employees – no more than it would have on an application for

> certification or in an application to terminate bargaining rights. If there is any other interest at all in the abandonment issue, it is an *employee interest*, and here, the employees (whoever they may be) have chosen not to participate in the Board's determination of this question.

Similarly, in *Enka Contracting Limited*, [2004] OLRB Rep. Sept./Oct. 926 (September 9, 2004) the Board put it this way:

> 54. We accept Enka's suggestion that the abandonment of bargaining rights in the ICI sector may serve to destabilize provincial bargaining. We agree with the employer's submission that the provincial bargaining scheme is rendered more durable if bargaining rights cannot be abandoned. Such a constraint would remove a union's ability to use the threat of loss of access to union work to negotiate favourable and unique terms with different employers – the flip side of the circumstances in *Aloia Brothers*. A union could not use the threat of abandonment to undermine the provincial scheme by dealing with employers directly, rather than through the employer bargaining agency. All of these propositions ring true from a labour relations policy perspective.
>
> . . .
>
> 56. There is also a countervailing policy concern. How can a collective bargaining relationship continue to be viable in a practical sense, where the union has concluded that the relationship is contrary to the interests of its membership generally? Why shouldn't a union be able to withdraw from a collective bargaining relationship where it has concluded that the ongoing relationship is no longer in the interests of its members?
>
> . . .
>
> 58. Having weighed the competing policy concerns and in view of the language of the statute, we conclude that the Act certainly does not contemplate any bar or prohibition (express or implicit) against the abandonment of bargaining rights in the ICI sector.
>
> 59. There is no provision in the Act which precludes the abandonment of ICI bargaining rights. The scheme of provincial bargaining rights contemplated by sections 151 to 168 of the act remains in our view, viable and functional, even if unions may abandon ICI bargaining rights. Although the abandonment of bargaining rights, if abused on a wide-scale basis, could serve to undermine the integrity of a provincial collective agreement, we see a greater risk in precluding unions from being able to withdraw from bargaining relationships where they have determined that such a course of action is in the best interests of its members.
>
> . . .
>
> 88. On the other hand, we find nothing inappropriate in the union's conclusion that a continuing collective bargaining relationship with Enka is not in the interests of its membership. The union is entitled – in fact obliged – to make such decisions about what is or is not in the interests of its members. Whether or not the Board would come to the same conclusion is not the question. Certainly the union's decision on this point cannot be said to be irrational or obviously unreasonable.

24. The union in *Enka Contracting* avoided many problems by abandoning bargaining rights at the end of the term of a provincial collective agreement. Thus, it could abandon its bargaining rights clearly and leave no residual or ongoing obligations or relationship with the employees of Enka or with the employer. The Board did find that there was a coercive motive behind the abandonment, and therefore delayed the effect of the abandonment for six months to permit the employer to arrange its affairs to deal with changed circumstances.

25. Neither of these cases was an application under section 147, but I conclude that the same principles apply. If the parent union concludes that its interests or the interests of all of its other members are not served by a continuing relationship, then it is entitled to sever that relationship, subject only to an analysis for just cause under section 147. As indicated, the term "sever a bargaining or institutional relationship" does not involve the dissolution of a local union in the context of a reorganization of the union in a given area or the reassembly or re-creation of various institutional or other legal relationships to accomplish the goals that the old local union failed to advance. It means a termination of all relationships, rights and obligations that exist between the parent union and the members of the local union and those employers with whom the local union has a legal relationship. That does not mean that the IU is forever barred from attempting to reorganize itself or to create a new presence (in this case in north-western Ontario) "from the ground up". There may be a reason on the facts of any case for the Board to bar future action by a parent union for a period of time. However, there is nothing in the Act, short of a finding that an organization is no longer a trade union, to prevent it from starting afresh to create a different future for itself in a given area. It must simply leave the old relationship entirely and completely and take nothing from it, or alternatively, be able to justify its plans for the future with the elements it has decided to keep, under section 149.

Just Cause

26. Section 147 lists four factors to be considered by the Board. However, it is worth noting that the requirement of just cause is easily satisfied in circumstances such as these. If the parent union has decided to walk away from a particular relationship, provided it does so completely and does not do it for a coercive or punitive motive, the Board is not likely to weigh the merits of the reasons for that decision, just as the Board was not prepared to weigh the merits of the union's decision in *Enka Contracting*.

The Trade Union Constitution

27. Local 25 argued that the IU had not followed its constitutional process in revoking Local 25's Charter. It did not provide the Board with the copy of the Constitution, although it suggested that the relevant extracts from it could be found in the decision involving *International Union of Bricklayers and Allied Craftworkers* [1999] OLRD No. 2470, Board File No. 2532-98-U (May 12, 1999). It did not say which procedures the IU failed to follow. In any event, section 147(4) does say that the Board is not bound by the trade union constitution in an analysis under section 147.

28. Local 25, of course, has no interest in the IU Constitution. Counsel said repeatedly that Local 25 would be happy to be rid of the IU, provided it could acquire the IU's bargaining rights in the area. In the context of a complete severance of relations, I see no purpose in inquiring into the correctness of a process in which Local 25 has no real interest, and about which

it has pled no facts, and which in any event does not deal with the real substance of what is at issue. If a parent union has decided to dissolve a local union, the Board will be concerned with the consequences of that decision, to a much greater extent than whether it was accomplished in accordance with the terms of its constitution.

The Ability of the Local Trade Union to carry out its Duties under the Act

29. Local 25 now has ten members, as both counsel conceded. The Servicing Agreement with the BACU is ample evidence that Local 25 is unable to function as a trade union independently, and must depend on another union for all of its day-to-day functioning. The ten members are members of the International Union as a matter of convenience only. Assuming they have adopted all of the practices of the BACU and other IU Locals (other than Locals 6 and 7), they will ensure that IU Local 25 maintains the barest existence. In any event, this factor is of limited importance in the context of a parent union dissolving a local union.

The Wishes of the Members of the Local Trade Union

30. All ten members of Local 25 are members of its Executive Board. Given that counsel spoke for Local 25, he is presumably speaking on the instructions of the members of the Executive Board, thus reflecting their personal as well as their institutional interests. These persons are all members of the BACU and, according to counsel, would like nothing better than to see the IU leave north-western Ontario, provided it left the bargaining rights behind. That is, they wish to continue to receive all of the advantages of the status of members of an IU Local, with none of the corresponding obligations or benefit to the IU. I give little weight to such wishes in the context of this case.

31. Counsel for Local 25 suggested that the IU was attempting to avoid a liability for "death benefits" for certain members of the IU. He alleged no facts that would suggest any member of IU Local 25 qualified for such benefits, or that the dissolution of the IU Local would affect that right. In any event, such rights, and the ability to affect or rescind such rights are prima facie matters to be determined in court rather than before the Board. If there is a labour relations aspect to the issue, it was not pleaded nor is it apparent to me.

Whether the alteration would facilitate viable and stable collective bargaining without causing serious labour relations problems

32. As is evident from the brief description of the events that led to this point, the issue of bargaining rights is not a simple one. Local 25 stated that all, or virtually all, of its bargaining rights, are found in the ICI sector of the construction industry. That is, it is not party to a series of collective agreements that cover employees of a number of local contractors in a number of sectors. They are all bound by the provincial collective agreement between the Ontario Provincial Conference of the IU and the Masonry Industry Employers' Council of Ontario. Thus, the bargaining rights held by Local 25 are part of a larger province-wide pattern. What happens in Thunder Bay has a potential impact across the Province. Superimposed on the provincial collective agreement is the 2004 Agreement that creates an additional set of interlocking relationships with the BACU and with virtually every contractor in the Province. Thus, the impact in one area on collective bargaining will be felt, and perhaps multiplied, over both the provincial collective agreement and the bargaining relationships of the BACU (which cover most

of the Province). It is that pattern of collective bargaining with which I am concerned in this decision, rather than the theoretical or potential harm to 10 persons who would rather not be members of the IU in any event.

33. Local 25 suggested three different ways that the act of the IU might have harmed viable and stable collective bargaining in revoking the charter of Local 25:

> (a) it would constitute an abandonment of bargaining rights;
>
> (b) the bargaining rights of Local 25 would cease to exist as a result of its disappearance and nothing would replace them; or
>
> (c) the provisions of the collective agreement governing terms and conditions of employment, or indeed the right to claim work for members of the Local, would disappear and members would be left with no substantive rights under an empty collective agreement.

Abandonment

34. I do not give this concern any weight. The Local Union's bargaining rights are all in the ICI sector. That means that in 1980 (by virtue of the then section 125(1)) and after that time (by virtue of subsection 151(2)), whatever bargaining rights IU Local 25 had or acquired also became bargaining rights that were enjoyed by every other affiliated bargaining agent in whatever province-wide bargaining regime then applied to IU Local 25. The Board's jurisprudence is quite clear: even if one affiliated bargaining agent which has a geographic jurisdiction over part of the Province abandons its bargaining rights, no such finding will be made with respect to other local unions with respect to what are, in this case, province-wide bargaining rights: see *Lorne's Electric* Ltd. [1987] OLRB Rep. Nov. 1405.

Disappearance of Bargaining Rights

35. The Act does not contemplate that a union may acquire bargaining rights in the ICI sector that do not cover the entire Province, except in limited circumstances. Sections 151(2) and 158(1) require that a certificate or a collective agreement contain a bargaining unit covering the entire Province unless pre-existing bargaining rights are already in place. Otherwise, those sections and sections 162 and 163(2) require that there be only one provincial agreement and that it be province-wide in scope. That requirement is binding on every EBA, including in this case the IU and the Ontario Provincial Conference of the IU, neither of which is restricted by geographic limitation. Even if bargaining rights could be said to disappear, there are no pre-existing bargaining rights of which the Local Union is aware that would suddenly come into being to prevent the application of section 162 or 163(2).

36. In one case, dealing with a termination application by a group of employees, the Board said that it was impossible to terminate the bargaining rights of only one local in a provincial collective agreement. In *Jan Peters Ltd.*, [1980] OLRB Rep. May 714 at para. 4, the Board said:

> 4. ... On May 1st the bargaining rights of the respondent became province-wide for the industrial, commercial and institutional sector of the construction industry. If

> this Board were to terminate bargaining rights for the Counties of Waterloo and Wellington, the bargaining rights would continue to exist for the remainder of the province and then the new subsection 2 of section 125 [now subsection 151(2)] would deem those bargaining rights to extend recognition back into the Counties of Waterloo and Wellington. Clearly such a result would be to render this application meaningless. …

This is the only occasion on which I am aware that the Board dealt with this issue, but the reasoning appears to be sound. There is no reason why the same reasoning would not apply to the issue of abandonment dealt with above. That is, the IU through Local 25 cannot abandon part of the Union's bargaining rights. In *Enka Contracting, supra*, the employee bargaining agency abandoned bargaining rights across the entire Province. However, I recognize that this decision is not binding on employers not parties to this decision, and different facts might lead to different results.

Effect on Collective Bargaining and the Presence of serious Labour Relations Problems

37. While the existence of these bargaining rights may not be in question, the practical value of such rights may be. Section 151(2) applies to bargaining rights, not to rights to specific benefits or terms under a collective agreement. The geographic area of Local 25 (Thunder Bay) and that of the nearest Local Unions (Local 29 in Sault Ste. Marie) are set out in the collective agreement and in their Charters. The geographic jurisdiction of IU Local 29 (Sault Ste. Marie) may be changed constitutionally only by the IU. The IU would, in my estimation, be unlikely to be inclined to do anyone any favours, nor is it obliged to do any. Thus, if IU Local 25 were to cease to exist, the collective agreement would refer to a non-existent entity in north-western Ontario. The BACU collective agreement, which is not likely binding on any employers in the area, contains no reference to Local 25 or to north-western Ontario.

38. Arguably, then, if the IU Local 25 were dissolved and nothing else were done, there would be no terms of the collective agreement that would apply to the area. Because of the 2004 Order, it would not likely be possible to change the local union charter of any other local union to cover that area. It might be possible to renegotiate the collective agreement to change geographic jurisdictions. That might lead to a complaint by a member of Local 25 (since there is no local union party in existence in north-western Ontario anymore) or indeed, of Locals 6 and 7, of a violation of the 2004 Order.

39. This is not simply a theoretical concern. The ability of members of one local to travel into another area, or the right to claim work as "belonging" to members in a particular locality, is often the source of considerable acrimony among local unions. This is particularly the case if a very large project requiring many bricklayers were to be commenced in the area. The prospect of four months of steady work might well rekindle an interest in an individual bricklayer in his or her former IU Local.

40. Thus, there are certain rights, privileges and duties that are specific to IU Local 25. In particular there are certain rights privileges and duties that arise only from contract (the Provincial Collective Agreement) that might not survive the dissolution of the Local Union.

41. More importantly, to terminate the existence of Local 25 would lead to a situation that, by starting to unravel the 2004 Order, would not "facilitate viable and stable collective bargaining" and would cause "serious labour relations problems". The 2004 Order does not grow out of a labour relations regime constructed voluntarily by the parties. It was a compromise. It grew out of acrimonious litigation between the Ontario Locals and the BACU on the one hand, and the IU and its supporters on the other hand. These disputes complicated, if they did not cause, strikes throughout the 1990's and 2001. The parties' appetite for litigation has not waned significantly over a ten-year period. There were few, if any, innocent parties (except perhaps for Locals 6, 7 and 25). The BACU had successfully raided a large number of bargaining units and held the loyalty of a majority of members of the union outside Locals 6 and 7 and, until recently, Local 25. The OPC, still constitutionally tied to the IU, holds significant and important bargaining rights, and the IU commands the loyalty of a minority of members of the Union in the Province. The agreement that was the basis of the 2004 Order was a compromise that prevented those irreconcilable differences from disrupting the entire construction industry, and inflicting significant damage on both the businesses of employers and the economic fortunes of many, if not most, members of the Union.

42. The 2004 Order was not one that was of much value to the IU. That was simply a reflection of its strategically weak position and the fact that its strength was largely focused on institutional rights and powers rather than on majority support across the Province. It opposed the Order unsuccessfully. It has drawn very little institutional sustenance from it.

43. It is up to the IU to decide what is in its own best interests and the interests of its members, both in Ontario and elsewhere. It may decide, as it has done in this case, that it does not wish to expend further efforts on maintaining this unsatisfactory relationship. In keeping with the Board's view that a trade union is not obliged to expend efforts to represent a bargaining unit when to do so is unhelpful or inimical to the union's own interests, there is no reason to hold an international union to any internal institutional arrangement from which it no longer derives any benefit. However, before it may alter the jurisdiction of a local union by eliminating it, it must demonstrate that it meets this fourth provision of section 147(3), that is, it must do no serious harm.

44. In the context of the history of these parties as it stood at January 5, 2006, the date on which the Charter was revoked, the IU could not satisfy that test. It had left the issue of bargaining rights open in such a way as to undermine the stability of the collective agreement regime created in 2004 and expected to last until at least 2010.

45. The applicant argued that if the IU wished to sever the bargaining relationship, it ought to leave its bargaining rights behind. In making that submission, of course, counsel was talking about the institutional interests of the BACU, rather than those of IU Local 25. However, as indicated, those concerns affect all other Locals in the Province, not simply the members of the BACU in Thunder Bay. In considering an application under section 68, the Board has only ever considered that a "transfer of jurisdiction" can occur within the same institutional body, that is, bargaining rights may be transferred from a parent union to an affiliated local union, or between two local unions affiliated to the same parent body. There are very strong policy reasons not to extend that definition to interactions between two separate trade unions. Bargaining rights arise, ultimately, from the desire of employees to be represented in collective bargaining; bargaining rights are not chattels to be leased, transferred, sold, bought or disposed of in any other manner.

46. I conclude, therefore, that the IU will not be able to demonstrate, at least before 2010, just cause for this particular revocation of a charter unless it simultaneously takes steps to transfer the rights privileges and duties (including bargaining rights) of IU Local 25 to the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers. The OPC is the employee bargaining agency and is party to the collective agreement. It will be able to ensure that there are no serious labour relations problems arising out of the dissolution of the Local that affect employers and employees across the Province. Since the IU has not done so in this case, the application succeeds.

47. The other alternative, the abandonment of all bargaining rights anywhere in Local 25's territory does not exist for the reasons set out above. Any abandonment of bargaining rights must take place across the entire province.

48. Section 147 simply requires the Board to answer the question of whether or not there has been just cause with a "yes" or a "no". Since the answer in this case is "no", it is necessary simply to say that and to declare that since the IU did not have just cause to alter the jurisdiction of Local 25, such attempt to do so by revoking the Charter is void and of no effect. There is no equivalent to section 149(4) or any explicit provision empowering the Board to do anything else. In any event, no other relief is necessary or appropriate.

49. The Board therefore finds that the IU acted without just cause in purporting to revoke the Charter of IU Local 25, and that such attempted revocation is null and void and of no effect.

2928-05-G Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America, Applicant v. **J & A General Contractors Inc.**, Responding Party.

Construction Industry Grievance – Settlement – The Carpenters acknowledged they received a certified cheque from the responding party as part of a settlement – They further acknowledged having signed a release – The Carpenters lost the cheque and requested a hearing to enforce the settlement agreement – The Board found the responding party had lived up to its obligations; that the applicant received the consideration contemplated by the release, and that the loss or destruction of the cheque while in the applicant's possession does not make the responding party liable to replace it – Grievance referral dismissed

BEFORE: *Harry Freedman*, Vice-Chair and Board Members *Glenn Pickell* and *Richard Baxter*.

DECISION OF THE BOARD: February 19, 2007

1. The Board, by decision dated February 9, 2007, directed the applicant "to advise the responding party and the Registrar whether it accepts the release appended to the responding party's letter is authentic and if so, why this matter should proceed to the hearing scheduled for Wednesday, February 21, 2007."

2. The applicant has filed its submissions. It acknowledges the release described in that decision is authentic, but nevertheless submits the matter should proceed to hearing so that it can obtain another $5,000 certified cheque from the responding party. The release was signed on February 6, 2006. The applicant acknowledges that it received the payment described in the release, which payment included a certified cheque for $5,000. The applicant acknowledges it was in possession of the certified cheque for $5,000 from the responding party at the time the release was signed. The applicant states:

> At some point after February 6, 2006 the $5,000 certified cheque was lost or inadvertently destroyed. It has not been cashed. A diligent search of Local 27's and the Carpenters' Union's offices has failed to locate the certified cheque.

3. The applicant submits the hearing scheduled for February 21, 2007 is necessary to enforce the settlement agreement, which included the payment of $5,000 from the responding party. It claims that $5,000 was not paid as the certified cheque it had received from the responding party was never cashed.

4. The responding party has clearly lived up to its obligations under the settlement agreement by providing the applicant with a certified cheque for $5,000. The question in this case, it seems to us, is whether the applicant or the responding party is liable for the loss of $5,000 that resulted from the certified cheque being destroyed or lost by the applicant. Surely the applicant would not be suggesting if it had received $5,000 in cash from the responding party that was subsequently lost or destroyed before being deposited it could recover those funds from the responding party. To state the question in that way is to answer it, in our view.

5. We are satisfied the responding party is not responsible to provide the applicant with a further payment of $5,000. Once the cheque was certified, the responding party was no longer in possession of those funds. It is up to the applicant to take the necessary steps to secure those funds from the bank on which the certified cheque was drawn. It is not up to the responding party to go to the time and expense of obtaining another certified cheque.

6. In our opinion, no useful purpose would be served by having this matter listed for hearing. The release executed by the applicant in favour of the responding party released the responding party from the claims arising in this matter. The applicant received the consideration contemplated by the release. The loss or destruction of the certified cheque for $5,000 while it was in the applicant's possession does not make the responding party liable to replace that cheque.

7. This grievance referral is dismissed. The hearing scheduled for February 21, 2007 is hereby cancelled.

2701-98-R; 2751-06-R; 2788-98-U Labourers' International Union of North America, Local 183, Applicant v. **K. J. Beamish Construction Services Ltd.**, Responding Party.

Abandonment – Bargaining Rights – Certification – Construction Industry – Delay – In 1998, Local 183 filed an application for certification for all the construction labourers of the respondent, Beamish – A vote took place and 23 of the 36 votes were challenged but the application was never disposed of – In November 2006 Local 183 brought an application for certification for the same bargaining unit – Beamish took the position that the 1998 application was still outstanding and that the 2006 application indicated Local 183's intention to withdraw the 1998 application – Beamish further argued that the Board should treat the 1998 application as having been withdrawn by Local 183, with a bar subject to subsection 7(10) of the Act – Local 183 offered no explanation for the delay or for why the 1998 application was never concluded – Absent any explanation for the delay, the Board dismissed the 1998 application as being abandoned as of the date of the present decision – The Board declined to characterize the 2006 application as a request to withdraw the 1998 application and thus determined that mandatory bars imposed pursuant to subsections 7(10) and 10(3) were not applicable – The Board did exercise its discretion pursuant to subsection 111(2)(k) and barred Local 183 for six months from the date of this decision from making an application for certification to represent the members of the bargaining unit of Beamish – Both applications (1998 and 2006) dismissed

BEFORE: *David A. McKee*, Vice-Chair.

DECISION OF THE BOARD: January 17, 2007

Introduction

1. This decision deals with three applications, which involve the same two parties, Universal Workers Union, Labourers International Union of North America, Local 183 ("UWU") and K. J. Beamish Construction Services Ltd. ("Beamish" or "the Employer"). The first is Board File 2701-98-R, an application for certification ("the 1998 application"). Board File 2788-98-U is an unfair labour practice complaint filed shortly after the 1998 application. Board File 2751-06-R ("the 2006 application") is an application for certification brought more recently for the same bargaining unit of construction labourers. The 1998 application was filed on November 6, 1998 and has never finally been disposed of. The issue that this decision deals with is the impact of that application on the more recent 2006 application and what the Board should do with all three of these applications. The facts are as follows.

The 1998 Application

2. On November 6, 1998 the UWU applied for certification as bargaining agent for a bargaining unit of all construction labourers in the employ of Beamish in Board Area 18 in all sectors other than the ICI sector. A response to the application was filed, although at the time, the UWU alleged that the response had been filed beyond the time when it ought to have been filed. Beamish responded that it had been delivered within the time required by the Act and the Rules because the application had not been delivered to it on the date alleged in the Certificate of Delivery. That issue was never resolved.

3. By decision dated November 13, 1998 the Board ordered that a representation vote be held on November 17, 1998.

4. The vote was held on November 17, 1998 and 36 persons voted. Thirteen ballots were cast without challenge. Twenty-three ballots were cast by persons whose right to cast a vote in the representation vote was challenged. In its submissions, the UWU suggests that those twenty-three challenges were still outstanding. From a review of the file, it would appear that all but four of them were challenges by the UWU of persons that Beamish said should be allowed to cast a ballot.

5. A regional certification meeting was set for December 9, 1998. The parties agreed to adjourn it to January 6, 1999. It does not appear from the file that a meeting took place on that day. A meeting was set for January 25, 1999. This was adjourned (by letter dated January 28, 1999) to February 10, 1999.

6. There is nothing in the Board's file to indicate what, if anything, happened on that day. As the UWU puts it:

> "This date was adjourned upon agreement of the parties and, ultimately, the Regional Certification Meeting was never reconvened".

7. On November 17, 1998 the UWU filed an unfair labour practice complaint against Beamish, seeking relief under section 11 and various other sections of the Act. No meeting with a Labour Relations Officer was ever held.

8. On September 12, 2001 the UWU wrote to the Board asking that both the 1998 application and the unfair labour practice complaint be re-listed for hearing. A hearing was set for Wednesday, October 31, 2001.

9. On October 26, 2001, Beamish wrote to the Board asserting that the Regional Certification Meeting ought to take place before a hearing.

10. The parties agreed to adjourn the October 31, 2001 hearing date to a date to be set by the Board in consultation with the parties.

11. A meeting with a Labour Relations Officer was scheduled for November 14, 2001. By letter dated November 7, 2001, the parties advised the Board that they wished to cancel that meeting as they were "meeting privately on November 22 and with the consent of the Board, will advise the Board whether such an Officer's meeting is required after such meeting".

12. After that, nothing happened. The parties did not write to the Board. The Board did not set another hearing date, nor does the file indicate any formal inquiry of the parties as to what, if anything, they were doing.

13. On November 29, 2006, the UWU filed the 2006 application. In this application the UWU seeks to be certified as bargaining agent for the same bargaining unit as sought in the 1998 application. The UWU concedes that at least one person who was in the bargaining unit in 1998 is or may also be in the bargaining unit in 2006. If the application proceeds, there are at least 9 persons whose status will be in dispute. In its response, Beamish took the position that the 1998 application was still outstanding and that the UWU had "now indicated its intention to withdraw the [1998] application". It submitted that the Board should treat the application as having been

withdrawn by the UWU, with a bar subject to subsection 7(10) of the Act. That bar would lead to the dismissal of the 2006 application.

14. The Board asked for the parties' submissions on this issue, which the parties filed within the time directed.

The options for disposing of the 1998 Application

15. The UWU has three proposals about what the Board might do with the 1998 application to cause it to cease to exist, with no consequences for the 2006 application. It requested the Board to do one of the following three things:

> "(i) Find that the Application had been effectively adjourned *sine die* for a period of one year or less commencing at the time that the Board cancelled the last scheduled event in respect of the matter, being a labour relations officer meeting scheduled for November 14, 2001, and find that the matter had been terminated following twelve months of inactivity; alternatively;
>
> (ii) Find that the Application had been abandoned after a lengthy period of inactivity, but in any event by no later than November 9, 2005, a full four years after the last event noted on record; or in the further alternative
>
> (iii) As requested by the Employer in its response to OLRB File No. 2751-06-R, treat the filing of the new Application as [a] request to withdraw the prior Application, however, exercise its discretion to grant the withdrawal as effective in 2001, a time when the Union consented to an adjournment of the labour board officer meeting scheduled for November 14, 2001 and then thereafter took no further steps to pursue the matter before the Board".

16. Beamish objects to the Board doing any of these things and set out detailed reasons why, in its view, the Board lacked the jurisdiction to do so. I do not accept all of the arguments of Beamish. In *Access Security Professionals Inc.*, [2005] OLRB Rep. Jan/Feb 3 (February 1, 2005) the Board discussed a number of ways that the Act can be interpreted and applied to fix a date that precedes the date of the actual written decision as the effective date of that decision. Whether or not it is statutorily possible to do any of the things the UWU requests is not material. There is simply no reason in this case why the Board should "deem" something to have happened that did not happen. It is not up to the Board to rescue the UWU from the situation it has created. There is no reason to pretend that the Board adjourned an application *sine die* six years ago at a time when it was not asked to do so. Indeed, the Board would only have done so on the consent of the Employer, which is not forthcoming, retroactively or otherwise. Nor is there any reason to treat a withdrawal as having been made five or six years earlier than the act alleged to be a withdrawal actually occurred.

17. To accede to these requests would be to permit an applicant to allow an application to drift over several years and then to choose whatever theoretical scenario suits its interests from time to time. In this case, the Union would like to choose from among: (1) an adjournment leading to an automatic "termination" on November 14, 2002; (2) abandonment at some time before November 9, 2005 or (3) a withdrawal of the application as of some time in 2001. Any of these options fit its current institutional interests. If other events had intervened, such as an application by CLAC or the United Brotherhood of Carpenters and Joiners of America, for this

same bargaining unit at any time after November 14, 2002, it is unlikely that the UWU would be taking any of these positions.

18. The UWU spent some time attempting to characterize the situation as one created by the Board. The Board is not indifferent to the fact that in this case its processes allowed an application to drift along like this for years. The Board will look to what it can do, consistent with its other obligations and priorities, and in particular allowing parties to maintain control of their own applications. However, the Board does not take responsibility for the dilatory conduct of the UWU or any other party before it. It does not provide advice or guidance, nor does it provide gratuitous reminders of when certain events might occur or what steps might be advisable. Parties, particularly applicants, are responsible for the conduct of their own cases. If they later come to the conclusion that they ought to have done something different in the past, that is not a matter with which the Board will be concerned. The Board will look at any case as it is presented by the parties and decide what needs to be done with it, when and if it is asked to do so.

19. The UWU relied on the Board's decision in *Access Security Professionals Inc., supra,* as the basis for asserting that the Board was responsible for some of the delay and should accept one of its alternative suggestions. The facts of that case were quite different from this one, and the exercise of the Board's discretion in that case is entirely consistent with this decision. In that case, the parties had agreed that an application for certification should be dismissed. They did so in formal Minutes of Settlement executed at a Regional Certification Meeting. The Board failed to act on that agreement, owing to what it described as "the human equivalent of falling behind a file cabinet". While the parties might have written asking the Board to issue a decision, no further action on their part depended on the Board doing so. When faced with an application for certification by a different trade union from the one involved in the earlier certification application, the Board returned to the first application and concluded that it would exercise its discretion to find that the effective date of the dismissal (and thus the commencement of the bar) was the date when the Board would have issued the decision if the file had been put before a panel of the Board at the time it would normally have been. The facts in this case are entirely different. The Board was never asked by any party to do anything, nor was there any specific task that the Board was to undertake that it let slip. Parties are responsible for moving their own cases along, not the Board.

Interests of Employees

20. Both parties referred to a number of decisions of this Board over the past three years, commencing with *Kaitlin Group*, [2003] OLRB Rep. Jan./Feb. 80 (January 21, 2003). That decision dealt with a request by parties to adjourn a certification application *sine die* for a period not exceeding one year. The Board did not agree to do so. While parties are normally entitled to let applications proceed at whatever pace suits their interests, a certification application involves the interests of employees in a bargaining unit. In that case, and in most similar cases since, the Board said:

> 5. ... Parties for their own institutional interests may wish to leave matters in abeyance for long periods of time. The Board would not normally interfere in such an arrangement if agreed to by all parties. However, in an application for certification, there are employees whose rights must be considered.
>
> . . . .

> 6. While there is an application for certification outstanding, no other application may be made by any other trade union … to represent those employees. It appears unlikely that the same six employees employed (if indeed all six were so employed) by some or all of the responding parties on July 27, 2001, constitute the entire employee compliment in this bargaining unit of all of the responding parties in January 2003. The Board cannot terminate an application for certification. Once a representation vote has been held, the statute does not permit the Board to do anything other than to certify the applicant union or to dismiss the application.
>
> 7. If the Board were to follow the procedure proposed by the parties, and nothing were to happen for one year, the application would be dismissed on January 16, 2004 (assuming the file came forward to a panel at that time, a process that might not occur given the way the agreement is drafted). That would mean that pursuant to section 10(3) no trade union could apply to represent employees in this bargaining unit at least until after January 16, 2005, fully four and one half years after the six persons cast a ballot in a representation vote.
>
> 8. Both parties may have good institutional reasons for accepting this state of affairs. However, employees in the bargaining unit ought not to have their rights suspended indefinitely for a period of this length when the application is not being actively pursued. The parties must make up their minds about this, and indeed should have done so well before now.

21. The same considerations apply in this case. While an application for certification is outstanding, employees may not seek to bargain collectively through any other bargaining agent. They may not bring a termination application, as no bargaining rights exist to be terminated. In theory, the employees of Beamish have been subject to a wage freeze since November 6, 1998.

22. For this reason, it is particularly important that parties proceed to deal with an application for certification with as much dispatch as is reasonable in the circumstances of each case.

Determination of the 1998 Application

23. The UWU states that if the Board is not prepared to accede to any of its three requests, then the Board should re-list the 1998 application and the unfair labour practice complaint, including its request for relief under section 11, for hearing. Perhaps one might also consider having the Regional Certification Meeting, which never took place. Assuming this went to hearing, that would involve the determination of the status of twenty-three challenged voters to cast a ballot in the representation vote taken in 1998.

24. In its submissions, the Employer withdrew its notice under section 8.1. A review of the file suggests to me that the majority of the challenges to status were made by the Union and, in the normal course, the obligation would fall on the Employer, Beamish, to produce them as witnesses. Thus, Beamish would be put to the task of finding most of the twenty-three individuals who may have worked for the Employer on November 6, 1998. Assuming they can be found, the parties and the Board would then seek to ascertain precisely what work they were doing on one day 8 or 9 years ago. The likelihood that any such hearing would arrive at conclusions in which anyone could have much confidence is limited. In addition, the UWU

would now like to pursue allegations of unfair labour practices, consisting primarily of who said what to whom some eight or nine years ago.

25. The UWU may decide that it is prepared to undertake the burden of proceeding in these circumstances, but there will inevitably be some prejudice to other parties involved in attempting to litigate events that occurred over eight years ago is self-evident. One would not realistically expect anyone's memory, particularly that of an employee with no particular reason to remember the day, to be especially reliable. Prejudice is less important for Beamish, which has let the matter drift as well, but this prejudice is not entirely its fault. It is quite possible that factual issues that Beamish could not have anticipated in 1998 might arise in the course of the proceeding. While Beamish ought to have prepared its file by copying what it believed to be the relevant documents at the time, progress on the file ceased before any disputes had been crystallized at a Regional Certification Meeting. If a matter now arises in examination of any particular employee or by reason of any other issue that was not immediately evident, Beamish may well have some difficulty in retrieving necessary documents. By 2006 there is no tax or commercial reason to retain documents from 1998.

26. Before embarking on such an inquiry, it is up to the UWU to explain why this delay has occurred, and how it proposes to deal with the inevitable difficulties created for Beamish, and more importantly for the Board. The UWU has offered no explanation as to why the delay occurred. Beamish speculates that the UWU staff simply forgot about the application. That may be true. That is not something the UWU is prepared to admit. The UWU simply dismisses the possibility of any prejudice to anyone, without referring to the practical realities of litigating eight-year-old events.

27. In the absence of any explanation for the extraordinary delay, I find as a question of fact that the UWU has abandoned this application. As the UWU itself says:

> "In the alternative, it is the position of the Union that it is open to the Board to determine that after five years of complete inactivity, and more than eight years following the initial application, the Board may treat the prior application as having been abandoned".

I agree, as a finding of fact, that the UWU abandoned this application. It did absolutely nothing for a period of five years, has provided no explanation for why it did nothing, and filed an essentially identical application in 2006, which did not even refer to the 1998 application.

28. The Board can look at the facts in the file and come to the conclusion that the application was abandoned. In the absence of any information from the UWU, I do not know whether it was abandoned by virtue of a specific decision to do nothing further on the file or by a process of simply forgetting about it. It does not matter when the application was abandoned. No one has asked the Board to make any determination about that issue until the 2006 application was filed. The Employer, and in a different way the UWU, urged this proposition on the Board. I agree with that assertion as a factual matter.

29. The question is what to do with that finding of fact. In this case, the only appropriate thing to do is to dismiss the application as one that was abandoned by the applicant. The Board was not asked to make any findings of fact before this time, nor was it asked to do anything with

this application before November, 2006. In dismissing this application as abandoned, the Board is acting as of the date of this decision. There is no reason to fix some other date when the Board might have done so, if it had been asked to do so, and if the facts were the same, and if no other argument had been presented to it.

30. The 1998 application is dismissed as of the date of this decision.

The Unfair Labour Practice Complaint

31. For the same reasons, the unfair labour practice complaint is dismissed as abandoned as of the date of this decision.

The Question of a Bar

32. The 1998 application was made under section 8 (as it then was). The mandatory bars that are imposed under subsection 7(10) and 10(3) apply only after a withdrawal or a defeat in a representation vote. Beamish seeks to characterize the 2006 application as a request to withdraw the 1998 application. I decline to do so. It is certainly evidence of a desire to abandon the 1998 application, but once again, I decline to turn an application into something it is not, i.e. a withdrawal of some other application. There is, therefore, no mandatory bar.

33. However, the Board still retains a discretion to impose a bar under subsection 111(2)(k):

> **111.** (2) Without limiting the generality of subsection (1), the Board has power,
>
> . . .
>
> (k) to bar an unsuccessful applicant for any period not exceeding one year from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing the employees within any period not exceeding one year from the date of the dismissal of the unsuccessful application.

The eight-year delay worked an unfairness on the persons who were in the bargaining unit during all or part of that time. The reason behind the Board's desire to ensure that certification applications do not languish on its shelves is not simply a matter of administrative convenience. The concern raised by the Board in the *Kaitlin Group* and other cases is the prejudice to employees. At the very least, the statutory freeze was, at least in theory, in effect. More importantly, although the particular employees may have changed, the bargaining unit of construction labourers has been kept in limbo for a period in excess of 8 years. That group of employees has not been able to exercise any rights as members of a bargaining unit to bargain collectively or otherwise. It is possible that another trade union might have applied for certification and successfully litigated the issue of whether the Labourers' application had been abandoned. (That, of course, is the position I have reached in this decision, but not one advanced by either party.) However, the risk and effort of doing so would have been a powerful disincentive to any other union. The UWU has been unable or unwilling to act on behalf of this bargaining unit for a long period of time. The employees ought to have the option of considering other approaches to bargaining at this point.

34. In this case, the appropriate disposition of the 1998 application is to impose a bar to the UWU from applying to represent this bargaining unit for some period from the date of this decision. On those occasions when the Board has imposed a discretionary bar, the length of time is usually six months. Those cases were almost all before 1995 when the maximum bar was 10 months. Although it was rarely if ever imposed, the 10-month bar was reserved for cases of egregious wrongdoing. Although the employer is a road building company that is likely to employ no one in the bargaining unit before the spring, there is no reason to depart from the Board's practice in this case. Thus, the employees are free to engage in collective bargaining through any other bargaining agent, or, should they choose to be represented by the UWU, to wait substantially less time than it would have taken to complete the 1998 application in any event.

The 2006 Application

35. The 2006 application was filed on November 9, 2006. At that time, the 1998 application was still outstanding; the Board had not at that time made or been asked to find that the application had been abandoned. At that time the Board had two choices under subsections 111(3) (b) and (c):

> (3) Despite sections 7 and 63, where an application has been made for certification of a trade union as bargaining agent for employees in a bargaining unit or for a declaration that the trade union no longer represents the employees in a bargaining unit and a final decision of the application has not been issued by the Board at the time a subsequent application for the certification or for the declaration is made with respect to any of the employees affected by the original application, the Board may,
>
> (a) treat the subsequent application as having been made on the date of the making of the original application;
>
> (b) postpone consideration of the subsequent application until a final decision has been issued on the original application and thereafter consider the subsequent application but *subject to any final decision issued by the Board on the original application*; or
>
> (c) refuse to entertain the subsequent application.

In practical terms, it does not matter which option is taken. Subsection (a) is clearly inappropriate given the long period of time between the two applications. The application could be dismissed under subsection 111(3) (c). If the Board were to postpone consideration of the 2006 application pending the disposition of the 1998 application, then at the time it turns its attention to the 2006 application, that application is barred by virtue of the imposition of a bar to a reapplication by the UWU. In either event, the 2006 application is dismissed.

Conclusion

36. For the reasons set out above, the Board:

(1) dismisses the 1998 application as having been abandoned;

(2) bars the UWU for a period of six months from the date of this decision from making any application seeking to represent the employees in the bargaining unit sought in either application for certification, pursuant to section 111(2)(k);

(3) dismisses the 2006 application on the basis that the 1998 application was in existence on the date it was filed, and because at any time after that application had been dismissed, a bar was imposed on the UWU.

2386-06-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. 1425105 Ontario Inc. o/a **Les Burch & Son Contracting**, Responding Party.

Certification – Membership Evidence – Practice and Procedure – Reconsideration – In the context of a reconsideration of a certification application where the employer provided the Board with affidavit evidence from employees who swore they had not signed membership cards, the Board allowed the trade union to have the employees' signatures subjected to forensic analysis – As the request for reconsideration was proceeding to hearing, the union sought the Board's permission to disclose to the employer the identity of the person whose signature was challenged – Disclosure granted – Matter continues

BEFORE: *Harry Freedman*, Vice-Chair.

DECISION OF THE BOARD: January 25, 2007

1. The Board, by decision dated December 1, 2006, referred this request by the responding party for reconsideration to the Registrar to be listed for one day of hearing for the purpose of hearing the evidence and representations of the parties with respect to the responding party's allegations relating to the membership evidence filed by the Labourers.

2. Subsequently, the applicant requested the Board allow a forensic document examiner it had retained access to the membership documents for the purpose of examining the original membership evidence and the affidavits filed in order to prepare an expert report. The Board, by decision dated December 11, 2006 granted the applicant's request.

3. Counsel for the applicant, by letter dated January 24, 2007 filed the expert report with the Board. In that letter, the applicant requests the Board's consent to release information to the responding party that would disclose the identity of the individual who the applicant contends signed a membership card and who signed an affidavit swearing he "did not prior to October 30, 2006 or on or after October 30, 2006 sign a union membership card signifying that I agreed to be a member of the Labourers' Union."

4. The Board in its December 1, 2006 decision stated it would not at that time disclose the overlap between the persons who swore affidavits saying they had not signed a union membership card and the membership evidence filed by the applicant so that the identity of the

persons who had (or at least who appeared to have) signed membership cards in the applicant would not be revealed.

5. The applicant did not provide the responding party with a copy of the expert report because doing so would disclose the identity of the person whose name appears on the membership evidence filed and who had filed an affidavit swearing he had not signed a membership card. The applicant did, however, advise the responding party of the expert's conclusion.

6. As this request for reconsideration must proceed to a hearing where the identity of the person who swears he did not sign a membership card but whose name appears on a membership card the applicant filed and who the applicant asserts was the person who in fact signed that membership card will be revealed, the Board is satisfied that it must consent to the disclosure of that person's name. The responding party is entitled to see the expert report obtained by the applicant well before the hearing and may request access to the membership evidence in respect of that one person for the purpose of having it examined by an expert document examiner before the hearing.

7. The Board in its decision dated November 7, 2006 certifying the applicant advised the parties that the applicant had filed membership evidence on behalf of three of the five persons named on the list of employees the responding party had filed. One of those three persons had also sworn an affidavit saying he had not signed a membership card in the applicant. Therefore, the hearing of this matter which is now scheduled for Monday March 5, 2007 will deal with the evidence and representations of the parties with respect to whether the membership evidence filed by the applicant on behalf of David Morley was in fact signed by him.

8. If the responding party wishes to have the membership document filed by the applicant on behalf of Mr. Morley examined by an expert document examiner, it must make its request to do so as soon as possible and in any event, not later than February 16, 2007.

9. The Board directs the applicant to forthwith provide the responding party with a copy of the expert report it had filed with the Board. If the responding party retains an expert document examiner to examine the membership document filed by the applicant on behalf of Mr. Morley and provide a report, a copy of that report must be provided to the applicant not later than February 28, 2007.

2155-06-M United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, **Mechanical Contractors Association of Ontario** Applicants v. International Union of Operating Engineers, Local 793, Ontario Sheet Metal Workers and Roofers' Conference, Sheet Metal Workers International Union, Local 285, Ontario Sheet Metal and Air Handling Group, Responding Parties.

Construction Industry – Reference – The Minister of Labour asked the Board if he could accede to a joint request from the Employee and Employer Bargaining Agencies of the plumbers and pipefitters industry (ICI sector) to alter the designated bargaining unit description to include gasfitters and their apprentices – The Board found that the fact that gasfitter was not a distinct craft but rather a task performed by at least two skilled trades was a compelling reason against the requested amendment – The Board distinguished between work jurisdictional claims and descriptions of crafts: describing crafts in a general way promotes the flexibility of the industry to adapt to technological changes – Inserting work tasks may increase uncertainty and litigation in certification applications – The Board advised the Minister that the requested amendment would not serve the interests of the labour relations community and was not necessary to advance or protect the craft of plumber and pipefitter

BEFORE: *Mary Ellen Cummings*, Alternate Chair.

DECISION OF THE BOARD: January 3, 2007

1. The Minister of Labour referred a question to the Board, pursuant to section 153(4) of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended ("the Act"), that arose concerning the applicants' designation. The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("the Plumbers") and the Mechanical Contractors Association of Ontario ("MCAO") jointly requested the Minister to alter the description of the bargaining units in their designation. The current designation applies to "journeymen and apprentice plumbers and pipefitters". The joint request for an amendment seeks the addition of gasfitters and gasfitters' apprentices.

2. The applicants assert that such an amendment is appropriate to conform to the craft description presently contained in the bargaining unit description of the ICI collective agreement between them. The Plumbers are also concerned that there are a number of non-union companies whose employees work as gasfitters, and are interested in being organized. However, there is a concern that without an amendment to the designation, the Board may be unwilling to certify the Plumbers to represent a bargaining unit of gasfitters in the ICI sector.

3. The Minister requested advice about the following:

> What are the possible implications for the plumbing and pipefitting industry, in particular and for the ICI labour relations community in particular if I were to grant the request made by [the Plumbers and MCAO]?

Submissions from other trades

4. The Board gave notice of the application to all employee bargaining agencies who are parties to Province-wide agreements in the ICI sector of the construction industry. In this way, the Board gave notice to the bargaining agents who represent all of the trades who might have an interest. The employee bargaining agencies were invited to seek to intervene.

5. Submissions were received from the International Union of Operating Engineers, Local 793; Ontario Sheet Metal Workers and Roofers' Conference; Sheet Metal Workers International Union, Local 285 and Ontario Sheet Metal and Air Handling Group.

6. The Operating Engineers indicated that they might be affected by the request, but reserved their right to make further submissions until they had a better understanding of the nature and scope of work that is sought to be added. No additional material has been provided by the applicants and the Operating Engineers have made no further submissions.

7. The submissions of the two employee bargaining agencies and the affiliated bargaining agent in the sheet metal trade were similar. They assert that the term "gasfitter" does not describe a trade, but that gasfitting describes a variety of tasks that are performed by a number of trades, depending on the context. Most important, they argue that gasfitting is part of the trade of sheet metal worker when those tasks are performed as part of the installation of gas-fired components.

8. The Sheet Metal Workers' International Association, Local 285 submitted that the proper term is "gas technician" not gasfitter, since that is the term used to describe a person who is qualified to perform the related tasks, pursuant to the regulations to the *Technical Standards and Safety Act, 2000*. For example, sheet metal workers possess certificates as gas technicians, a requirement for the fabrication and installation of gas-fired heating units, venting of exhaust away from those units, as well as the plenums and plenum take-offs directly connected to the plenum.

9. The sheet metal trades are concerned that adding "gasfitters" to the designation of plumbers and pipefitters gives the wrong impression that gas technician tasks are performed only by that trade. They remind the Board that it has been wary about adding elements to one designation that describe tasks that could be performed by a range of trades. They note that in support of single trade bargaining, the Board has preferred to limit the descriptions in designations to broadly described single trades. They ask the Board to apply the considerations set out at paragraph 32 of the *Metropolitan Toronto Demolitions Contractors' Association*, [1993] OLRB Rep. July 612:

> If the purpose of the designations is to broadly describe crafts so as to recognize and encourage province-wide single trade bargaining within the ICI sector, it appears to be counter-intuitive to add to such designations a separate specific type of work which may be part of that craft, but which standing alone does not constitute a craft. This is especially true when, as here, there are at least three trade unions each of which asserts that the work function or task is part of its already designated craft or trade. To add specific work functions or tasks to a "craft based" designation system could cause confusion and a blurring of the distinction between representational rights and work jurisdiction claims.

10. The sheet metal unions oppose the amendment to the designation, or in the alternative, seek to have a similar amendment to their own designation, to include the term gas technician. The applicants have written that they do not oppose that amendment.

Analysis and Decision

11. Essentially, the employer and employee bargaining agencies of both the plumbing and pipefitting trade and of the sheet metal trade have agreed that both trades perform gasfitting functions as an element of their work. The tasks involved in gasfitting arise, in different contexts, in the sheet metal trade and in the plumbing and pipefitting trade. Such an agreement strongly suggests that there is no distinct craft of gasfitter. Rather, gasfitting is performed by at least two skilled trades. Such a conclusion is a compelling reason to recommend that the designation not be amended. As the Board set out in *Metropolitan Toronto Demolition Contractors' Association*, the original purpose underlying the designation process was to encourage single trade bargaining in the ICI sector of the construction industry. To support single trade bargaining, designations are generally based on historical craft boundaries, rather than a description of work tasks. The Board understands and acknowledges that different crafts may claim the right to perform the same tasks as a part of their craft, but the Board has tried not to confuse work jurisdictional claims with determining how a craft should be described for the purposes of the designation. The Board has also been wary about describing crafts in more than a general way, recognizing that as technology and construction practices change, detailed explanation of the work of a trade may hinder rather than promote the necessary flexibility in the industry.

12. In *Metropolitan Toronto Demolitions Contractors' Association*, the Board recognized the need to keep craft descriptions very general to avoid litigation in certification applications. However, the Board's powers to hear and determine work assignment disputes in the construction industry provide a means for crafts with overlapping claims to tasks to have those disputes resolved, as they arise:

> 33. Crafts and trades come and go, are modified and disappear as the construction industry changes and develops. Changes in construction materials and construction methods have caused a certain amount of fluctuation and flexibility in determining the parameters of any crafts' work functions or skills. That flexibility is and has been advantageous to the constituent members of the construction industry (employers and trade unions alike) as well as the Board. For example, that flexibility initially helps to avoid converting applications for certification into jurisdictional disputes. After certification or voluntary recognition it is that same flexibility upon which the parties will rely to assert or defend grievances and jurisdictional disputes by arguing that a specific type of work is or is not part of the craft, or the work jurisdiction of the trade, and is or is not covered by the collective agreement. To add to the existing structure of designations based on craft a specific work function or specific task would in our view diminish this existing flexibility.

13. The example relied on by the Board in *Metropolitan Toronto Demolition Contractors' Association* to explain the difference between a description of a craft and an assertion of work jurisdiction is apposite in this case. The Board noted that both the Plumbers and Boilermakers exert work jurisdiction claims over welding and welders, but the designation orders of neither trade refer to welding. At paragraph 27, the Board wrote:

> The designation orders of the Minister which relate to these two craft unions, and the certificates as bargaining agents granted by the Board to these two unions, do not however refer explicitly to welders. Rather, in claiming

> welding work each of these two craft unions rely upon assertions that the performance of the skill or work in question is part of their designated craft. It is important to keep this distinction between representation rights and claims to work jurisdiction in mind….

14. The applicants are presenting the same sort of problem faced in *Metropolitan Toronto Demolition Contractors' Association*. We are being asked to recommend to the Minister an amendment which would provide unnecessary and unhelpful detail to the trade of plumber and pipefitter and might well increase uncertainty in certification applications. If the amendment is made, there is the potential for increased litigation in certification applications, and organizing of workers could be impeded, rather than assisted. Granting the amendment might also encourage other trades to seek their own amendments, if they thought they could advance work jurisdiction claims through a more detailed description of their craft.

15. If, as the Plumbers assert, their concern is a lack of certainty about whether the present designation includes persons who install piping for the conveyance of gas as part of the trade of plumber and pipefitter, this decision serves as confirmation that those tasks are part of that craft. Similarly, when sheet metal workers perform gasfitting tasks as part of the installation of gas-fired heating components, that work is part of the trade of sheet metal worker. It is unnecessary to determine whether any other trades also perform gasfitting work, but this decision should not be read as a determination that the work is only performed by plumbers, pipefitters and sheet metal workers.

Summary

16. The Minister asked for advice about the following:

> What are the possible implications for the plumbing and pipefitting industry, in particular and for the ICI labour relations community in particular if I were to grant the request made by [the Plumbers and MCAO]?

I conclude that an amendment would not serve the interests of the labour relations community in the ICI sector and is not necessary to advance or protect the craft of plumber and pipefitter.

0022-05-ES Omer A. El Sayed, Applicant v. **Novaflow Systems Inc.** and Director of Employment Standards, Responding Parties.

Abuse of Process – Employment Standards – Practice and Procedure – In this employee application for review, the Board had issued earlier decisions describing the applicant's inappropriate, disrespectful and disruptive behaviour – Ultimately the Board was forced to cut short a hearing day because of the employee's conduct, and seek submissions from the parties as to how to proceed – The employer argued that to continue would be an abuse of process, the applicant had not pleaded a *prima facie* case or, alternatively, the applicant should provide a medical assessment of his ability to proceed – The applicant sought the Vice-Chair's recusal, an order from the Board admonishing

employer counsel's behaviour, and a broader investigation into his employment and discharge (including reprisal) – The Board refused to step down, confirmed that employer counsel's conduct had been courteous and restrained, and held that the breadth of the issues before it already encompassed the remedies the applicant was seeking – The Board terminated the hearing and dismissed the application because of the applicant's conduct

BEFORE: *Tanja Wacyk*, Vice-Chair.

DECISION OF THE BOARD: January 18, 2007

1. This is an employee application under section 116 of the *Employment Standards Act, 2000*, S.O. 2000, c.41, as amended, (the "Act") for the review of an Employment Standards Officer's refusal to issue an order to the benefit of the applicant.

2. In addition to reviewing those issues determined by the Employment Standards Officer, the parties agreed that I would assume jurisdiction on all aspects of the application, including those elements of the claim not determined by the Employment Standards Officer. Those elements include claims arising out of the termination of the applicant's employment. More will be said regarding this below.

3. By decisions dated October 19, and November 9, 2006, I set out some of my concerns regarding the applicant's conduct in the prior days of hearing in this matter. In my decision of October 19, 2006, I stated that the applicant's general behaviour in the hearing has been extremely troubling, and has included: pounding the table and pacing in anger; muttering angrily; raising his voice when unhappy with a ruling; glaring at various individuals including myself; and indicating, when I made a rule he did not like, that counsel for the employer and I were playing a "dangerous" game.

4. The applicant's conduct throughout has made it difficult to address the merits of his claim, as his efforts have been primarily focussed on repeated and unfounded procedural challenges, including several requests that I recuse myself on the basis that my rulings demonstrate a bias, as they were consistent with the arguments of counsel for the employer. He also continued to attempt to re-argue motions once I had made my rulings, and repeatedly disregarded my directions regarding how to proceed.

5. For example, the applicant subpoenaed witnesses currently employed by the responding employer, and despite my cautions that he would not be entitled to cross-examine them as they were his witnesses, he repeatedly tried to do so, despite objections from counsel for the employer and my interventions. The applicant then dismissed one of the witnesses, demanding unsuccessfully, an order that he be reimbursed the conduct money.

6. All of this consumed valuable hearing time and brought us no closer to addressing the merits of the applicant's claim.

7. Counsel for the employer also complained that the applicant had behaved in a threatening manner toward her while they were outside of the hearing room. While this was denied by the applicant, his angry and aggressive conduct in the hearing caused me to caution him that he is not to do or say anything threatening.

8. The applicant subsequently became so angry at an evidentiary ruling, that he pounded the table, hurled himself against the window and a wall, pulled his hair, and then threw himself under the table, thrashing about. As the applicant did not respond to my inquiries regarding whether he needed medical assistance, security was called and asked to medically assess the applicant (which the individual indicated he had been trained to do). The security agent, having spoken to the applicant, indicated it was his view that medical assistance was not required. He then escorted the applicant out of the building, where he remained for about 20 minutes.

9. On his return, the applicant accused me of calling security because of his race, without articulating any basis for this allegation, and in apparent denial regarding the inappropriateness of his conduct.

10. In my subsequent decision of October 19, 2006, I stated at paragraphs 7 and 8:

> 7. The applicant's conduct cannot continue. It is inappropriate, disrespectful, and disruptive.
>
> **8. The Board wishes to be very clear that should the applicant engage in any further behaviour of the sort outlined above, the hearing will be terminated.** [emphasis in original]

11. I also indicated that arrangements had been made for security to be in the room during the remainder of the hearing.

12. My November 9, 2006 decision dealt with the two subsequent days of hearing. In it, I noted that the applicant indicated that his prior conduct has been the result of a medical condition, and that he had taken medication, was fine, and able to proceed. However, during the day, he appeared poorly prepared, had difficulty locating documents he wished to rely on, and continued to attempt to proceed in a manner that was contrary to my instructions.

13. For example, as noted in my November 9, 2006 decision, the hearing had been structured so that the employer proceeded first regarding the allegation that the applicant's employment had been terminated as a reprisal. Consequently, the applicant was to cross-examine only on that issue, as the balance of his claim was to be dealt with separately. However, despite the objection of counsel for the employer and my direction to the contrary, the applicant repeatedly attempted to cross-examine Mr. Ewan Scott, the President and owner of the responding party employer, regarding other elements of his claim, as well as focussed on typographical and dating errors that were of little consequence to his claim.

14. As the applicant appeared at a loss as to how to proceed, the hearing was adjourned for 20 minutes to give him an opportunity to collect his thoughts, and focus his questions in cross-examination on his termination and the alleged reprisal. This appeared to assist the applicant and he concluded his cross-examination more or less without incident.

15. The applicant then began his testimony regarding his claims for unpaid wages, vacation pay, statutory holiday pay, etc. It quickly became apparent that the applicant was reading from a written document, which he indicated was approximately 40 pages long. In an effort to expedite matters, the parties agreed that rather than read his document into evidence, the applicant would e-mail a clean copy of the document (the applicant's copy contained his personal

notes) to Mr. Scott as soon as possible, and Mr. Scott would then send a copy to his counsel, and deliver a hard copy for me at the desk of the hotel at which I was staying. The hearing adjourned early to facilitate that process.

16. However, the applicant never produced the document as promised. Rather, at 9:29 p.m., Mr. Scott received only 14 pages and a cover page indicating the applicant would have a long night cleaning up the document, and would provide the balance as a hard copy the following morning.

17. The applicant was twenty minutes late arriving the next morning. While he apologized for being late, he offered no explanation. He was clearly agitated, and indicated he had been up all night trying to clean up his copy of the document, but that he had "nothing" for us. He quickly became more agitated and argumentative, interrupting both myself and counsel for the employer, raising his voice, rushing in and out of the room, pointing at counsel for the employer in a threatening and aggressive manner. When I pointed out to the claimant that we were not making any progress in light of his conduct, he responded that he was "sick sick sick".

18. At that point, given the applicant's escalating level of agitation, and out of concern his condition might deteriorate to the level it had previously, I terminated the hearing for the day.

19. Consequently, by the end of four full and one partial day of hearing, little progress had been made on the merits of the application.

20. In my November 9, 2006 decision I described the above behaviour, and indicated that in addition to the applicant's conduct having been inappropriate, disrespectful, and disruptive throughout the course of this hearing, he has also been disorganized, lacked focus, and resisted my efforts to proceed with some efficiency. I noted that his conduct has made it impossible to proceed in any meaningful manner, and has also put him at serious risk of physical harm.

21. In that decision, I directed the parties to file submissions regarding the appropriate next step in this matter. This decision deals with that issue.

PARTIES' SUBMISSIONS:

Employer

Abuse of Process

22. Counsel for the employer noted that the applicant was repeatedly cautioned regarding the impropriety of his conduct, but nevertheless has persisted. She submitted his general conduct and lack of preparedness constitutes an abuse of process. She points out it has seriously distracted from the issues before the Board, served to prolong the hearing grossly beyond what is reasonable in the circumstances, and has resulted in needless expense to the taxpayers of Ontario. Consequently, counsel for the employer submitted the application should be dismissed forthwith.

No Prima Facie Case

23. Counsel further pointed out that the parties have completed four full days of hearing before the proceedings were terminated on the fifth day. She submits that the applicant has not put forth any evidence in support of his claim within that time, and consequently has failed to make out a *prima facie* case.

24. Counsel for the employer further submits these proceedings are frivolous and vexatious and undertaken in large measure to impose inconvenience and expense upon the responding employer.

25. Consequently, counsel for the employer asks that I dismiss the application pursuant to Rule 39.1 [previously Rule 46] of the Board's Rules of Procedures which provides as follows:

> **39.1** Where the Board considers that an application does not make out a case for the orders or remedies requested, even if all of the facts stated in the application are assumed to be true, the Board may dismiss the application without a hearing or consultation. In its decision, the Board will set out its reasons.

26. Counsel for the employer also asks that my decision deal with the issue of lay-off and subsequent termination of the applicant's employment to avoid duplicating the proceedings, presumably through the subsequent claim filed by the applicant against this same employer, alleging "Illegal Termination of Employment", referred to in my decision of December 13, 2006.

Alternative Relief

27. In the alternative, Counsel for the employer submits that should I decide not to terminate/dismiss the proceedings, I ought to obtain a medical, physical, and psychological assessment of the applicant, conducted by a physician named by the Board.

Applicant

28. The applicant filed a 22 page submission, a portion of which was directed to the Chair of the Board. Much of that submission incorporates copies of his recent communication with the Registrar of the Board; a reiteration of his submissions of December 12, 2006 (dealt with in my decision of December 13, 2006); portions of my prior decisions; and portions of the submissions of counsel for the employer.

Recusal Request

29. The applicant denies the difficulties posed by his conduct and takes issue instead, with the manner in which I have conducted the hearing. His submission contains yet another request that I either recuse myself, or the Chair remove me from this matter.

30. The basis for this recusal request is apprehension of bias, and includes allegations that: I have made "erroneous decisions based on erroneous findings of fact; I inhibited the applicant's ability to present evidence, and refused to order full disclosure of documents; I shredded a

material document and listened to the employer "perjuring himself on the stand"; I lost control of the proceedings to "an over zealous counsel"; I joined the over zealous counsel "in a smearing campaign taking cheap shots" at the applicant's character and "making fun of" the applicant's disability.

Request for Order Admonishing Counsel for the Employer

31. The applicant also takes issue with the conduct and submissions of counsel for the employer. He challenges counsel's submission that I stated he has been "rude", and requests an order rebuking counsel for her behaviour, and directing her to cease and desist from misquoting my earlier decision.

Breadth of Issues Before the Board

32. The applicant, in this as well as a subsequent submission filed December 19, 2006, also denies this hearing encompasses the issue of "wrongful dismissal", and distinguishes this from his allegation that his termination was "illegal". His distinction appears to be based on the difference between the remedy of reinstatement versus that of termination and severance pay.

33. The applicant also submits that his agreement that the Board assume jurisdiction over the termination of his employment was the result of his belief that the Board would investigate that aspect of his claim, pursuant to section 119(6) of the Act, which provides that the Board may, with necessary modifications, exercise the powers conferred on an employment standards officer under the Act.

Alternative Relief Sought by Counsel for the Employer

34. The applicant submits that the suggestion that he submit to a medical/psychological examination is offensive, disrespectful, and violates the basic principles of natural justice. He further submits the Board has no jurisdiction to order him to submit to any medical examination or psychological assessment.

Proposed Next Step

35. As a next step, it appears the applicant requests that I direct a labour relations officer to investigate that aspect of his claim dealing with his termination. He makes this request pursuant to section 119(8) of the Act, which provides that any time after an application for review is made, the Board may direct a labour relations officer to examine any records or other documents, and make any inquiries it considers appropriate.

36. The applicant submits that both I and counsel for the employer have demonstrated an unjustified fear for our security, and perceive him as a terrorist. He alleges that this unjustified fear most probably results from his colour, race, and place of origin, but provides absolutely no basis for that assertion.

37. The applicant proposes that in light of this unjustified fear, and after the Board properly investigates his claim, the Board continue with this matter through a written hearing.

Employer Response

38. Counsel for the employer responded to the applicant's proposal that this matter continue by way of written hearing. She relies on Rule 38.4 of the Board's Rules of Procedure, to argue that the Board should not proceed by way of a written hearing. That Rule provides, in effect, that the Board may conduct a written hearing in any case before it, but will not conduct a written hearing on the merits when a party satisfies the Board there is good reason for not doing so.

39. Counsel points out that the parties have been preparing for an oral hearing over the course of the last 16 months, and that 5 days of oral hearing have already been completed. She also notes that the applicant has yet to testify, and asserts the responding party's right to cross-examine him.

40. Counsel further points out that the matter involves conflicting evidence, where credibility is in issue. She submits that a cross-examination in writing is "simply impossible" and would amount to a denial of natural justice. In addition, she submits the cost of proceeding with a written hearing would lead to extravagant costs for the respondent, and would likely prolong the process significantly.

ANALYSIS:

Recusal Request

41. The applicant's submission in support of his recusal request is inaccurate and misleading. Throughout this proceeding, in light of the applicant's self representation and self professed medical condition, I have afforded him significant latitude. The applicant has provided no basis on which it would be appropriate to recuse myself, and I again refuse to do so.

Request for Order Admonishing Counsel for the Employer

42. Counsel for the employer has been courteous and restrained throughout the course of this matter. Her characterization of the applicant's conduct as "rude" is consistent with my having stated that he was disrespectful, and does not constitute a "misquote" nor warrant a rebuke. Rather, I find the applicant's submissions in this regard frivolous, vexatious, and entirely without merit. I decline the applicant's request to make any order addressing the conduct of counsel for the employer.

Breadth of Issues before the Board

43. The applicant attempts to distinguish his claim of reprisal, in the form of his termination, and his new claim of "illegal termination", on the basis of the remedies sought i.e. reinstatement versus termination and severance pay. I find that in light of the parties' agreement that I would also deal with the applicant's termination, this is a distinction without a difference. I have access to the full range of remedies available under the Act if I were to find that the applicant's employment was terminated in violation of the Act.

Next Step

44. It is entirely inappropriate, following four days of hearing and one aborted day, to accede to the applicant's submission that I should now direct a labour relations officer to conduct an investigation into his claim. This request further demonstrates, as has been apparent throughout the hearing, that the applicant is either incapable of putting in his case, or that he has no case to put in.

45. I am also satisfied that it is not appropriate to proceed with this matter by written hearing, as there are significant disagreements regarding the facts, as well as issues of credibility to be determined.

46. The applicant's response to my direction of November 9, 2006, to make submissions regarding the appropriate next step in this matter, is representative of some of the difficulties presented by his conduct thus far. Rather than acknowledge his difficulties, and focus on how best to address them, he launches a lengthy and largely irrelevant attack on both myself, as well as counsel for the employer.

47. As stated earlier, I have given the applicant significant latitude in presenting his case. However, the Board has no obligation to assist a party who is disrespectful, unreasonable, vexatious, abusive, and is not making a reasonable effort to address the elements of his own claim – and I find that to be the case with regard to the applicant's conduct.

48. I agree with counsel for the employer that the applicant's conduct in this matter constitutes an abuse of process. The applicant's most recent submissions have given me no reason to believe this will not continue. Consequently, I find that that it is appropriate to terminate this matter at this time.

49. In light of my determination, set out above, I do not have to address the other elements of the submission by counsel for the employer. I might note, however, that in these circumstances, I have no jurisdiction to compel the applicant to submit to a medical/psychological examination.

DISPOSITION

50. This hearing is terminated and the application dismissed.

3443-03-R; 3449-03-R Canadian Union of Skilled Workers, Applicant v. **Ontario Power Generation Inc.**, Responding Party v. Power Workers' Union Canadian Union of Public Employees, C.L.C. Local 1000, Intervenor; **Bruce Power LP**, Responding Party v. Power Workers' Union Canadian Union of Public Employees, C.L.C. Local 1000, Intervenor.

Bargaining unit – Certification – Construction industry – The union sought to expand its existing bargaining units by displacing itself and applying for certification for broader bargaining units –The broader units included employees who were already subject

to collective agreements between the applicant and the responding parties but were not at work on the application date, plus all sectors of the construction industry in the Board Areas where the electricians employed by the responding parties were working on the application date – The applicant asserted that a displacement application was the only way for it to expand its bargaining unit which was necessary to ensure that its members would not be deprived of work by the responding parties' use of subcontractors bound by collective agreements with other trade unions – The Board held that the applicant was in the same position as any trade union seeking to displace another; thus the established policy that the appropriate bargaining unit in a displacement application is the unit held by the incumbent union applied unless there were clear and compelling reasons to hold otherwise – In this case there were no clear and compelling reasons as to why this long standing policy ought to be disregarded – The Board held that the appropriate bargaining unit was the one found in the applicant's collective agreement with each responding party – Matter continues

BEFORE: *Harry Freedman*, Vice-Chair.

APPEARANCES: *Lorne A. Richmond* and *J. Mulhall* for the applicant; *M. Patrick Moran* and *Max Jackson* for Ontario Power Generation Inc.; *David Cowling* for Bruce Power LP; *Nini Jones* and *John Sprackett* for the intervenor.

DECISION OF THE BOARD: February 26, 2007

1. The parties in these two applications for certification disagree about the description of the appropriate bargaining unit. The context in which the bargaining unit description issue arises is, I believe, material to its resolution.

2. The Board, differently constituted, by decision dated October 26, 2004 in these and several other applications, adjourned these two applications pending determination of a number of common issues. The parties consented to me sitting alone to hear and determine these two applications despite paragraph 7 of that decision in which that panel of the Board stated it remained seized with these two applications. Those common issues included whether the applicants could apply for certification for a bargaining unit for which they already held bargaining rights. An element of that issue, as described in the Board's October 26th decision, was:

> whether the applicants can use these applications to expand the scope of the bargaining unit they seek to represent by relying on the employees who they already represent but who were not employed in the expanded portion of the bargaining unit on the application date.

In a decision dated May 30, 2005 (*Ontario Power Generation* Inc., [2005] OLRB Rep. May/June 464 (May 30, 2005) the Board dismissed a motion to dismiss those other certification applications on the grounds that the applicants were seeking to displace themselves as the bargaining agent of the affected employees. The Board held at page 468:

> even if the applicants are seeking to displace themselves and expand the scope of their bargaining units, we are satisfied that the Act does not preclude the applicants from making these applications.

3. The applicant is bound by a collective agreement with each of the responding parties. The bargaining unit in each collective agreement encompasses electricians employed by the responding parties working on their property throughout the province of Ontario. The bargaining unit the applicant seeks to represent in each application is the bargaining unit in its existing collective agreements together with all sectors of the construction industry in the Board geographic areas where the electricians employed by the responding parties were working on the date of application. In the case of Ontario Power Generation Inc., the applicant seeks a bargaining unit encompassing all sectors of the construction industry in Board Areas 8 and 9 together with all employees coming within the scope of the collective agreement between it and Ontario Power Generation Inc. It seeks a similar bargaining unit in respect of Bruce Power LP for Board Area 3.

4. The responding parties initially reserved the right to argue, if necessary, at a later stage in the proceeding, that the applicant was actually an affiliated bargaining agent of the Labourers' International Union of North America. At the second day of hearing dealing with the bargaining unit description, the responding parties indicated they were satisfied to proceed without raising that issue or commenting upon it. It was clear from the outset of the applicant's argument these applications were made pursuant to section 158(4) of the Act. Thus, when the responding parties indicated they were not going to argue the applicant was an affiliated bargaining agent, that issue was no longer before the Board in this proceeding. It appears therefore that for purposes of these two applications, the parties accepted the applicant's position that it is not an affiliated bargaining agent and could therefore seek bargaining rights in respect of the industrial, commercial and institutional sector of the construction industry in the Board areas where the employees it seeks to represent were working on the application date.

5. The applicant submits it is bringing this application under section 158(4) of the Act because it is not represented by a designated or certified employee bargaining agency. The applicant contends section 158(4), unlike sections 158(1) and 158(2), does not prescribe the description of an appropriate bargaining unit. The applicant submits the collective agreements by which it is bound to the responding parties are silent with respect to sector. While it assumes the construction work done under those collective agreements comes within the electrical power systems sector, given the evolution that has been occurring in this province in relation to the generation and transmission of electrical power, it is by no means certain the responding parties would accept that construction work on their property comes within the electrical power systems sector and, more importantly, whether the collective agreements covering employees doing construction work on their property would apply to construction work that is outside of the electrical power systems sector.

6. The applicant argues the bargaining unit it seeks in each application is comprised of two elements, both of which the Board would find appropriate on their own. It submits that if there was no collective agreement in place, its application under section 158(4) would result in a bargaining unit comprised of the electricians in all sectors of the construction industry in the Board area where the employees were working. It also points out that in accordance with the Board's usual policy on displacements, if the applicant sought certification for the bargaining unit described in its collective agreements with the responding parties, that bargaining unit would also be appropriate. Therefore, it contends that if the two elements of the bargaining unit it claims is appropriate for collective bargaining would be considered appropriate separately, then surely

having the Board put them together as one unit ought to result in finding the larger comprehensive bargaining unit is also appropriate.

7. The responding parties point out the applicant seeks one bargaining unit comprising the employees covered by their collective agreements with the applicant and all sectors of the construction industry in the Board areas where they were performing work on the application date. They argue this issue was determined by the Board in its August 22, 2005 decision involving these responding parties and the trade unions seeking certification under section 158(1) of the Act: *Ontario Power Generation Inc.*, [2005] OLRB Rep. July/August 675 (August 22, 2005). The responding parties submit the Board's approach to displacement applications is very clear. A union seeking to represent employees who are bound by a collective agreement must take the bargaining unit as it exists in that collective agreement. They say if the applicant were to succeed with its argument, the Board's long standing and consistent approach to certification proceedings would be undermined and the Board would be reversing itself less than two years after making a decision based on the same arguments that were made, unsuccessfully, when the Board dealt with the matters giving rise to its August 22nd *Ontario Power Generation Inc.* decision.

8. Ontario Power Generation Inc. argues the applicant's concern about sector and the possibility of work being done in a different sector but on its property is irrelevant to the matter. As the applicant pointed out, the collective agreements between the responding parties and the applicant are not limited to a particular sector. Those collective agreements apply to employees performing work on the property of Ontario Power Generation Inc. and the property of Bruce Power LP. It contends the principles of certainty when dealing with certification applications and labour relations stability are far more significant than the potential harm the applicant contends might exist if the bargaining unit it seeks is not granted.

9. Ontario Power Generation Inc. also argues there are no good policy reasons for allowing a trade union that holds bargaining rights to apply for certification to enlarge those bargaining rights through the use of the employees it currently represents. If there are individuals who are not represented by the applicant, then the applicant is free to attempt to persuade those persons to become its members. The applicant does not, however, have the right to represent anyone who might perform work on the property of Ontario Power Generation Inc. simply because it is party to a collective agreement with Ontario Power Generation Inc. that applies to employees of Ontario Power Generation Inc. working on its property. It submits the applicant wishes to broaden the scope of its bargaining rights to capture employees of Ontario Power Generation Inc. that might in the future perform work off its property.

10. The applicant represents the employees of Ontario Power Generation Inc. and Bruce Power LP working as construction electricians on their property throughout the province of Ontario pursuant to the CUSW collective agreement. If Ontario Power Generation Inc. or Bruce Power LP employ individuals to perform work falling outside the scope of that collective agreement, the responding parties argue the applicant can seek to represent them through an application for certification. But, if there were no such individuals working at the time the application was made, then according to the responding parties, there is no good reason to expand the bargaining unit as the applicant requests.

11. The essence of the applicant's submissions is that the responding parties can veto any attempt on the part of the applicant to enlarge the scope of its bargaining unit while the responding parties are free to determine, by the use of subcontractors bound by collective agreements with other trade unions, what unions will represent employees doing work that might otherwise be done by its members. The applicant contends the Board must redress that imbalance of power. The applicant cannot achieve that change through bargaining unless the responding parties agree, so the only option left to compel a change to the bargaining unit description is through the certification process.

12. The applicant emphasizes the Board in its August 22, 2005 decision was focussed on the fact that the existing collective agreements arose through voluntary recognition and that to permit the applicants in that case to broaden the scope of the bargaining unit by relying on the employees in the bargaining unit would undermine the integrity of the voluntary recognition process. The responding parties submit that whether the bargaining rights were obtained through certification or voluntary recognition is immaterial to the result. To rely on that distinction would simply involve a two step process rather than one. More importantly, the responding parties argue the source of the bargaining rights is irrelevant to the competing principles of certainty and stability on which the Board relied when it held the applicants in that proceeding could displace their existing unit and seek certification for a second unit in the areas and sectors not encompassed by their existing unit.

13. The Board in its August 22nd *Ontario Power Generation Inc.* decision at page 683 relied on the following statement made earlier by the Board in *Ontario Power Generation Inc.*, [2001] OLRB Rep. Nov./Dec. 1400 (November 5, 2001) at page 1414:

> In the end, the basic rationale which underlies the Board's policy with respect to the appropriate bargaining unit in a displacement application is applicable to the facts of this case: the importance of ensuring that decisions about the future of a bargaining unit are made only by members of that bargaining unit; the presumed viability of voluntarily created bargaining structures; and the need for certainty and predictability in representation matters. While the results may not sit comfortably for some of the parties to this application, none of the considerations urged on the Board in this case undermine the application of these principles in this case.

Later in that August 22nd decision, the Board at pages 686 and 687 pointed out that "the Board's approach to finding that the appropriate bargaining unit in a displacement application is, almost invariably, the bargaining unit for which the incumbent union holds bargaining rights." That principle was reinforced in that decision by referring to voluntary recognition agreements as the source of those bargaining rights.

14. Ontario Power Generation Inc. suggests, in the alternative, that the bargaining unit the applicant seeks to represent, if it applied for certification when there was no collective agreement in place, could be appropriate if it abandoned any bargaining rights it has under the collective agreement beyond the Board areas for which it seeks certification. In effect, Ontario Power Generation Inc. submits that the applicant could have obtained a certificate under section 158(4) of the Act for all sectors of the construction industry in Board Areas 8 and 9 if it had first relinquished its collective agreement with Ontario Power Generation Inc. Rather than force the applicant to go through that artificial process of abandonment followed immediately by an

application, the Board could determine the appropriate bargaining unit as if there had not been a collective agreement in place, and find the unit the applicant seeks appropriate so long as it was limited to those two Board areas and did not encompass employees working outside of those Board areas in the bargaining unit described in the CUSW collective agreement.

15. The applicant submits there is no proper reason for it to abandon any part of its bargaining rights outside of the Board areas where employees were working in order to secure what it says are the minimum bargaining rights it would be entitled to receive in an application under section 158(4). The employees affected by these applications voted in favour of continued representation by the applicant. Therefore, there is no justification for finding the appropriate bargaining unit does not include the portion of the bargaining unit described in its collective agreement outside of the geographic areas in which employees were working on the application date.

16. The responding parties equate what the applicant is seeking in these two applications to what the applicants sought in the applications dealt with by the Board in its August 22, 2005 decision in *Ontario Power Generation Inc.* In those applications the applicants sought to have their parent international unions removed as the bargaining agents and parties to the Electrical Power Systems Construction Association ("EPSCA") collective agreements. The Board noted in that decision the applicants were, together with their parent unions, parties to the EPSCA collective agreements by virtue of section 146 of the Act. In that sense, those applications were "displacement" applications while the applicant in this proceeding argues it is not "displacing" itself, but rather is seeking certification for a broader bargaining unit that would be clearly appropriate for collective bargaining, but for the existence of its collective agreements with the responding parties.

17. The Board's approach to bargaining unit descriptions where one union seeks to displace another is well established. That approach is based on the policy considerations articulated by the Board in numerous decisions including the Board's August 22, 2005 decision in *Ontario Power Generation Inc.* cited earlier. See also *Toronto East General and Orthopaedic Hospital, Inc.*, [1981] OLRB Rep. Feb. 225; *Crown Electric*, [1982] OLRB Rep. May 660; *Milltronics Limited*, [1980] OLRB Rep. Jan. 56; and *Bestview Holdings Limited*, [1983] OLRB Rep. Feb. 185 where the Board made it clear that a trade union seeking certification for employees who are already represented by a trade union must take the existing bargaining unit unless there are compelling reasons not to do so when it wrote at page 192:

> …the Board clearly and definitively enunciated its policy in respect of displacement applications: the existing bargaining unit is *presumptively* appropriate, and will be maintained unless there are good reasons for altering the *status quo*. Such reasons might include the inadequacy of representation by the incumbent union or collective bargaining difficulties generated by the established structure. It is not enough to show that some smaller employee grouping may also be appropriate.

18. The applicant contends it is not "displacing" another trade union but rather is applying for certification through a representation vote, putting itself at risk should the employees for whom it holds bargaining rights vote against continued representation. The sole purpose of these applications is to obtain what it contends is the "bare minimum" bargaining units it would be entitled to represent if it applied for certification without being bound by a collective agreement. It asks rhetorically why should it be worse off for having a collective agreement applicable to one

segment of a Board area when it seeks certification than it would be if it did not have a collective agreement with the employer. The applicant submits that it is seeking to expand its bargaining rights through the only vehicle open to it. It does not wish to displace another bargaining agent, but rather wants to stabilize and regularize the bargaining unit it does represent.

19. The applicant suggests an analogy to what it is seeking in this case would be a situation in which a union and an employer were subject to a collective agreement with the bargaining unit defined by a specific street location in the City of Toronto. At the time the union was certified, the employer had two other locations in the City, but both had since closed. The union, during the course of collective bargaining seeks to expand the scope of its unit to the entire city, concerned the employer may move to another location within the city, but the employer refuses to agree. That same union then files a timely certification application for a city wide bargaining unit that encompasses the unit described in its collective agreement with the employer. The applicant argues there can be no doubt that a municipal wide bargaining unit would be appropriate for collective bargaining and suggests the Board would make that finding. It submits the existence of the collective agreement with a single street location bargaining unit should not affect the result when the union that is party to the collective agreement seeks through certification to obtain labour relations stability by expanding the bargaining unit to the municipality in which the employees work.

20. It is by no means certain the Board would adopt the approach the applicant suggests. The Board has not, as far as I am aware, amended the description of a bargaining unit in a collective agreement to broaden it through a certification application by the union party to that collective agreement. While the Board in *Greater Essex County District School Board*, [2000] OLRB Rep. May/June 470 (May 2, 2000) permitted the Carpenters' Union, Local 494, by displacing itself, to extend the scope of its ICI provincial bargaining unit to encompass schools that became the responsibility of the employer following the consolidation of local school boards, the bargaining unit in that case was prescribed by section 158(1) of the Act. The Board, when determining the geographic scope of a bargaining unit in a certification proceeding, is engaged in a balancing of interests that include not just the rights of the incumbent union and current employees to a viable and stable bargaining unit but also the right of future employees at other locations to choose whether to be represented by a trade union. (See *Adams Furniture Co. Limited*, [1975] OLRB Rep. June 491; *T.R.S. Food Services Limited*, [1980] OLRB Rep. April 542.)

21. Moreover, the analogy used by the applicant is not particularly apt in the context of labour relations in the construction industry. Trade unions and employers in the construction industry often have collective bargaining relationships that are sector specific, or as in these cases, limited to specific property. Indeed, the bargaining units in the collective agreements between the responding parties and other trade unions are also limited to work performed by employees on their property. There is an established framework of collective agreements with a province wide geographic scope by which the responding parties are bound within which both the applicants and the other trade unions that represent employees who perform construction work on the property of the responding parties operate.

22. The bargaining unit in the applicant's collective agreements with the responding parties, although silent with respect to sector, is specifically applicable to employees who perform construction work on the responding parties' property throughout the province of Ontario. Rather

than define the bargaining unit by sector, the applicant and the responding parties have defined the bargaining unit by reference to the employers' property. The Board in its August 22nd decision in *Ontario Power Generation Inc., supra* at page 687 made the following comment that in my view, is also applicable in these applications:

> The applicants can attempt to obtain bargaining rights through certification for those parts of the employers' activities outside the scope of the EPSCA collective agreement, but in order to do so, must obtain membership support from employees who are working outside the scope of the EPSCA collective agreement....

Simply put, if the applicant wishes to expand the bargaining rights it holds for employees of the responding parties, it must organize and apply for certification in respect of such employees when employees are working outside the scope of its collective agreements with the responding parties.

23. The applicant says it is not displacing another trade union but rather is seeking to expand its bargaining unit through the certification process. In my view, the applicant, by seeking certification in these circumstances, is in the same position as any other trade union that might apply for certification to represent the employees in the bargaining units for which it holds bargaining rights. The applicant has not demonstrated any compelling justification for the Board to find the existing bargaining units for which it holds bargaining rights are not appropriate. The applicant's rationale for seeking to expand the scope of the bargaining units seems to be based on an apprehension of what might take place in the future should the responding parties undertake construction activity on their property and claim such work is not covered by the collective agreement because that work is outside the electrical power systems sector, or that they may undertake construction work off their property.

24. Neither of the applicant's concerns merits a departure from the long standing and sensible principles the Board applies where an application for certification is made to represent employees who are subject to a collective agreement. In this case, the first concern expressed by the applicant is not at all compelling given the parties have made it clear the collective agreement is silent with respect to sector. Construction work carried out by employees of the responding parties on their property is subject to the applicant's collective agreements regardless of which sector such construction work is in. As for the second concern, if the responding parties carry out construction work off their property, such work is outside the scope of the collective agreement and the applicant has no existing right to represent the employees who perform that work. There is, in my view, no justification for extending the scope of the applicant's bargaining unit to encompass that work when there were no employees doing such work at the time these applications were made.

25. It seems to me the description of the appropriate bargaining unit in these applications must be based on the basic principles the Board uses when determining an appropriate bargaining unit in the construction industry under section 158(4) of the Act. Section 158(4) provides:

> Despite subsections (1) and (3), a trade union that is not represented by a designated or certified employee bargaining agency may bring an application for certification or enter into a voluntary recognition agreement on its own behalf.

In making that determination, the Board's approach was succinctly summarized in *Reitzel Heating & Sheet Metal Ltd.*, [1988] OLRB Rep. Dec. 1310 at page 1320, where it commented upon what is now section 158 of the Act:

> A trade union which is not represented by a designated E.B.A. may bring an application under subsection 5 [now subsection 4] without reference to sector. In this latter instance the bargaining unit is normally defined as (1) all trades at work on the date of application, in (2) all sectors of the construction industry and (3) in a geographic area described by reference to a Board area.

That description of how the Board determines an appropriate bargaining unit under section 158(4) of the Act must also take into account the principles referred to earlier. In my view, the approach taken by the Board in the August 22nd *Ontario Power Generation Inc.* decision relied on by the responding parties, despite being based on section 158(1) of the Act, is also applicable in these two applications. The Board in *Reitzel Heating & Sheet Metal Ltd.* captured that approach when it wrote at page 1317:

> We concur with the general proposition that in the exercise of the Board's discretion, in a displacement application the policy of the Board has been that the appropriate bargaining unit is the unit held by the incumbent trade union. In the absence of some clear and compelling reasons why this long standing policy of the Board ought to be disregarded, we would not lightly set aside or interfere with this well established policy.

26. In these applications, the employees in issue were working in Board Areas 8 and 9 in the case of the Ontario Power Generation Inc. application and Board Area 3 in the Bruce Power LP application and on the property of their respective employers. They were working within the scope of the bargaining unit described in the CUSW collective agreements. There were no other employees affected. The applicant is in effect seeking to "displace itself" as the bargaining agent for those employees. I disagree with the applicant's suggestion that it was putting itself at risk by making this application should the employees vote against continued representation by the applicant. If that had occurred, the certification application would have been dismissed and the applicant's collective agreements with the responding parties would remain in place. I am satisfied these applications ought to be determined in accordance with the well established principles relating to displacement applications as the applicant has not provided "clear and compelling reasons why this long standing policy ought to be disregarded."

27. The parties agreed that I was to determine in general terms the description of the appropriate bargaining unit in each application and then leave it to the parties to agree upon the precise description, failing which the matter would be remitted to me for a final determination. The appropriate bargaining unit in each application is the bargaining unit found in the applicant's collective agreement with each responding party. I leave it to the parties to agree upon the exact description of the appropriate bargaining unit.

28. This panel of the Board remains seized with determining the final description of the appropriate bargaining units in these two applications and any other outstanding issues the parties are unable to resolve.

3448-03-R et al Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. **Ontario Power Generation Inc.**, Responding Party v. Electrical Power Systems Construction Association, Intervenor No. 1 v. Labourers' International Union of North America, Intervenor No. 2 v. United Brotherhood of Carpenters and Joiners of America, Intervenor No. 3 v. International Union of Operating Engineers, Intervenor No. 4 v. Power Workers' Union Canadian Union of Public Employees, C.L.C. Local 1000, Intervenor No. 5.

Bargaining Unit – Certification – Construction Industry – Sector Determination – The parties to these various applications for certification sought a determination from the Board for a number of issues relating to bargaining units – In an earlier decision (May 24, 2006), the Board confirmed that the appropriate bargaining unit is the bargaining unit described in the EPSCA collective agreement which bound the parties at the time the applications were filed – The Board assisted the parties in clarifying the work covered in the bargaining unit description – The Board confirmed that the bargaining unit described in the August 22, 2005 decision was limited to the electrical power systems sector, and held that the certificates should make specific reference to that sector – Finally, the Board made determinations respecting the correct names of the responding parties – Separate certificates to issue at a later date

BEFORE: *Harry Freedman*, Vice-Chair.

APPEARANCES: *Lorne A. Richmond* and *Harold Bartlett* for Labourers' International Union of North America, Ontario Provincial District Council; *Doug Wray* and *Rick Harkness* for the Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America; *Doug Wray* and *Ian McIsaac* for the Millwright Regional Council of Ontario, United Brotherhood of Carpenters and Joiners of America; *M. Patrick Moran* for Ontario Power Generation Inc., Siemens Canada Limited, Babcock & Wilcox Canada Ltd., and the Electrical Power Systems Construction Association; *Scott T. Williams* and *Jon Rebick* for Hydro One Inc. and Hydro One Networks Inc.; *David Cowling* for Bruce Power LP and Curran Contractors Limited; *Erin Kuzz* for Crossby-Dewar Projects Inc.; *Michael Failes* for Aecon Industrial and Tomlinson Steel Limited; *Michael Horvat* for Comstock Canada Ltd. and Black & McDonald Limited; *Christopher Robertson* for Brighton Beach Power Ltd.; *Nini Jones* for Power Workers' Union Canadian Union of Public Employees, C.L.C. Local 1000; no one appearing for F.D. Light & Power Ltd. o/a Dundas Drilling, John Hayman & Sons Co. Ltd., Labourers' International Union of North America, United Brotherhood of Carpenters and Joiners of America or International Union of Operating Engineers.

DECISION OF THE BOARD: January 16, 2007

1. The hearing in these applications for certification reconvened on January 12, 2007 to deal with the outstanding issues raised by the parties. The Chair of the Board had authorized me to sit alone to hear and determine these matters pursuant to section 110(14)(a) of the *Labour Relations Act, 1995*, c. 1, as am. (the "Act"), despite paragraph 9 of the Board's May 24, 2006 decision in 22 of these 24 proceedings in which the Board, comprised of Messrs. Pickell, Haward and me, noted we were seized with these matters. That same panel of the Board, by decision

dated July 6, 2006, referred the applications in Board File Nos. 0531-04-R and 1534-04-R to the Registrar to be listed for hearing together with these other applications. When the hearing convened, none of the parties attending the hearing objected to these matters proceeding before me sitting alone.

2. The Board in its May 24th decision outlined the remaining issues in dispute among the parties. The parties disagreed over the precise description of the appropriate bargaining units in these applications for certification. The Board in that May 24, 2006 decision had commented at paragraph 7:

> In reviewing the parties' submissions with respect to the bargaining unit description, it appears that the parties' dispute is more a matter of "form" rather than "substance". The Board had determined that the appropriate bargaining unit in these applications is the bargaining unit described in the EPSCA collective agreement by which the parties were bound at the time these applications were filed. It appears the parties disagree over how to describe the bargaining unit in EPSCA collective agreement for purposes of these applications for certification.

The Board had also noted there was some dispute about the correct name of the responding party in Board File Nos. 3457-03-R, 0527-04-R and 0926-04-R. In addition, the parties in Board File No. 0114-04-R advised the correct name of the responding party in that application was also an issue and agreed it too should be dealt with in this hearing.

3. There is no dispute that the bargaining unit described in the Electrical Power Systems Construction Association ("EPSCA") collective agreement that was in place at the time the applications were filed (the collective agreement between the Power Council of Unions and EPSCA) is the appropriate bargaining unit for each of these applications. The difficulty arises because the bargaining unit description in that collective agreement is complex as that collective agreement contained both a master portion and trade appendices establishing the scope of the bargaining unit.

4. The parties did reach agreement on almost all of the common language for the scope of the bargaining unit. The portion of the bargaining unit description upon which agreement was reached reads as follows (with disputed language in square brackets):

> All employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed [in the electrical power systems sector] in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One Inc. and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities.
>
> *the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses:
>
> - construction of new facilities
> - additions to existing facilities
> - major – modifications
>   – rehabilitation

> – reconstruction of existing facilities
>
> For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50KV), transmission stations, microwave and repeater stations.
>
> The work [described above] shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for:
>
> (a) the supply of aggregate and concrete used in the construction of said facilities; and
>
> (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers.
>
> The term "employee" shall include all employees of the Responding Party in the classifications set out below or in the following classifications: [For the carpenters' and labourers' bargaining units, the employers seek to add: "The following classifications are covered by the bargaining unit.]

The parties agreed on the lists of classifications that would be set out in the bargaining unit descriptions.

5. There were three distinct issues raised by the parties with respect to the bargaining unit descriptions. The first was whether the description of the bargaining unit should explicitly provide it is limited to the electrical power systems sector. The second was whether the words "described above" should be inserted in the sentence following the definition of the bulk power system. The third issue relates to the manner in which the employee classifications would be set out in the bargaining unit description.

6. During the course of argument, the parties resolved the third issue in relation to the Millwrights' bargaining unit. They agreed the last two paragraphs of the bargaining unit description in the Millwrights' applications ought to read:

> The term "employee" shall include all employees of the Responding Party in the classification of Millwright, which shall include welders, burners, subforemen, journeymen and apprentices employed in the Millwright Trade.
>
> The term "foreman" shall include all millwright foremen of the Responding Party between the ranks, but not including, working foreman and general foreman.

7. Dealing with the second issue first, the rationale provided by the applicants for not including the words "described above" was simply that those words were not present in the bargaining unit description set out in the Power Council collective agreement with EPSCA. After hearing the applicants' submissions, I indicated that I need not hear from the responding parties on the second issue as I was satisfied that the sentence was clearer and more precise with the addition of the words "described above". The absence of those words in the bargaining unit description in the Power Council collective agreement with EPSCA did not justify, in my view,

the continuation of a lack of precision. The bargaining unit in that collective agreement encompassed construction work performed throughout the province of Ontario for the bulk power system on the property of what was once Ontario Hydro and is now the property of Ontario Power Generation Inc., Hydro One Inc. or Bruce Power LP. Since construction work on the bulk power system on property acquired by those entities for the purposes set out in items (a) and (b) above comes within the bargaining unit, adding the words "described above" to that sentence makes perfectly clear what the word "work" when it appears for the first time in that sentence refers to.

8. The third issue between the applicants and the responding parties is whether a sentence indicating the classifications listed are covered by the bargaining unit should be added. The applicants contend the addition of that sentence is both unnecessary and would limit the bargaining unit to only those classifications. The applicants refer to section 1.2 of the Carpenters' and Labourers' appendices (which are virtually identical) that provide:

> Carpenters
>
> If additional classifications are required, they will be negotiated as appropriate for the work in the electrical power systems sector.
>
> Labourers
>
> If additional classifications are required, they will be negotiated, as appropriate, for the work in the electrical power systems sector.

The applicants suggest the responding parties are seeking, with the addition they propose, to limit the scope of the bargaining unit to the existing classifications set out, and deprive them of the opportunity they had had under section 1.2 of their trade appendices to negotiate over having additional classifications added to the bargaining unit.

9. Ontario Power Generation Inc., Siemens Canada Limited, Babcock & Wilcox Canada Ltd. and EPSCA submitted it was not their intention to limit the applicants' ability to bargain over adding new classifications to their bargaining units, and having heard their submissions on that point, were content to use the same approach to the language that was adopted for the Millwrights' bargaining unit.

10. Hydro One Inc. and Hydro One Networks Inc. submitted the language the responding parties wanted to have added did reflect more closely the bargaining unit in the Power Council collective agreement with EPSCA. They argued the bargaining unit should specifically describe what classifications of employees are in the bargaining unit to avoid future problems. They also submitted the applicants would be free to raise any issue they might have about adding new classifications to the bargaining unit during bargaining in any event. They suggested section 1.1 of the Labourers' and Carpenters' appendices to the Power Council collective agreement with EPSCA contained the language they wished to add to the bargaining unit description. Finally, they said section 1.2 of the Carpenters' and Labourers' appendices to that collective agreement were not part of the bargaining unit and therefore their effect should not be imported into the certificates the Board issues in these matters.

11. Section 1.1 of the Labourers' appendix stated: "The following classifications are covered by this Appendix: [classifications omitted]" while that section of the Carpenters' appendix provided: "The following is a list of classifications covered by this Appendix: [classifications omitted]". Hydro One Inc. and Hydro One Networks Inc. suggested they were merely seeking to substitute the words "bargaining unit" for the word "appendix" so that the scope of the bargaining unit described in the Board's certificates to be issued in these cases would be clear.

12. Bruce Power LP and Curran Contractors Limited agreed with Hydro One Inc. and Hydro One Networks Inc. They submitted there was nothing wrong with adding the language about the classifications being in the bargaining unit since there should be certainty over the limits of the bargaining unit.

13. Aecon Industrial and Tomlinson Steel Limited adopted the approach taken by Ontario Power Generation Inc., Siemens Canada Limited, Babcock & Wilcox Canada Ltd. and EPSCA provided the bargaining unit explicitly stated it was limited to the electrical power systems sector. Otherwise, they argued the approach taken by Hydro One Inc. and Hydro One Networks Inc. was appropriate. Crossby-Dewar Projects Inc. agreed with and adopted the position taken by Aecon Industrial and Tomlinson Steel Limited. Comstock Canada Ltd. and Black & McDonald Limited adopted the arguments made by Bruce Power LP and Curran Contractors Limited.

14. The applicants perceived the additional language sought by the responding parties as limiting their ability to have additional classifications added to their bargaining units, a right they say they had with respect to the bargaining unit in the Power Council collective agreement with EPSCA and the bargaining unit the Board ruled was the appropriate bargaining unit in these applications in its decision of August 22, 2005 (reported at [2005] OLRB Rep. July/August 675). It seems to me the analysis of the bargaining unit description suggested by Ontario Power Generation Inc., Siemens Canada Limited, Babcock & Wilcox Canada Ltd. and EPSCA is the correct approach. The complexity and nuances of the bargaining unit description in the Power Council collective agreement with EPSCA that the Board found to be the appropriate bargaining unit in these certification applications should be replicated as much as possible in the certificates the Board is going to issue in these applications. Contrary to the submissions of Hydro One Inc. and Hydro One Networks Inc., I am satisfied that section 1.2 of the Carpenters' and Labourers' trade appendices to that collective agreement is an element of the bargaining unit description. To that end, the ability the applicants say they had to negotiate additions to the bargaining unit which they contend is contained in the language they proposed for the description of the bargaining unit in these cases ought to be maintained. Therefore, the bargaining unit description will not contain the following clauses as originally proposed by the responding parties: "The following classifications are covered by this bargaining unit" or "The following is a list of classifications covered by this bargaining unit".

15. The applicants oppose inserting any reference to the electrical power systems sector in the bargaining unit description. They say the bargaining unit in the Power Council collective agreement with EPSCA did not contain any reference to sector and more importantly, given the changes that are taking place in the construction industry's understanding of and the Board's approach to the purview of the electrical power systems sector, the applicants say the Board should not in these applications impose any precise limitation on the sector scope of the bargaining unit. The applicants argue the Board need not in these applications for certification

undertake an interpretation of what the reach of the bargaining unit is. That is a matter that should be left to the parties to deal with after the certificates are issued. In essence, the applicants contend they should be free to argue in the future, if the need should arise, that the bargaining unit is not limited to the segment of the electrical power systems sector of the construction industry that involves work on the bulk power system on the property of Ontario Power Generation Inc., Hydro One Inc., and Bruce Power LP. Since the bargaining unit described in the Power Council collective agreement with EPSCA did not refer to the electrical power systems sector, neither should the certificates.

16. The responding parties all claimed that the reference to the electrical power systems sector in the description of the bargaining unit was of fundamental importance in these proceedings. They say there can be no doubt that the Power Council collective agreement with EPSCA was clearly limited to the electrical power systems sector. They referred to *Ontario Hydro*, [2005] OLRB Rep. May/June 437 (May 6, 2005) in which the Board, in interpreting that collective agreement wrote at page 463:

> We conclude that the collective agreement is a collective agreement entirely within the electrical power systems sector and that nothing in this agreement creates bargaining rights in any other sector. The agreement covers all work on Ontario Hydro property for the bulk power system, which work includes such structures as administration buildings, sewers and watermains, pipelines, dams, earthworks, landscaping and roads. In the context of wok on Ontario Hydro property, these structures are in the electrical power systems sector.

The responding parties submit that it is critical to refer to the electrical power systems sector in the certificate because the bargaining unit the Board determined was appropriate in its August 22, 2005 decision was limited to the electrical power systems sector since all parties bound by the EPSCA collective agreement understood and accepted it applied only to construction work in that sector. Moreover, if the certificate does not specify the bargaining unit is confined to the electrical power systems sector, it may be open to the applicants at some time in the future to attempt to argue that the certificates the Board issues in this case granted bargaining rights beyond the electrical power systems sector. They point out the Power Council collective agreement with EPSCA is clearly limited to the electrical power systems sector by reason of a number of different provisions in that agreement including, but not limited to the third recital introducing the master portion of the collective agreement and section 1.2 of the Carpenters' and Labourers' appendices. Since the recitals and section 1.2 of those trade appendices would not appear in the certificate, they contend their ability to argue that the certificate was intended to grant bargaining rights in respect of only the electrical power systems sector would be significantly impaired.

17. The essence of the applicants' arguments opposing the inclusion of the electrical power systems sector in the certificates is that it is not necessary for the Board to do so as the bargaining unit described in the Power Council collective agreement with EPSCA is silent with respect to sector and the Board had made it clear that the applicants' bargaining units in these applications were the bargaining unit described in that collective agreement. It is apparent to me the applicants in making these applications recognized that their existing bargaining rights were limited to a portion of the electrical power systems sector in the province of Ontario. The Board in its August 22nd decision in these applications described at page 680 the position taken by the

applicants in respect of the bargaining unit for which they held bargaining rights under that collective agreement and their rationale for seeking an expansion of that bargaining unit:

> The applicants contend that their bargaining rights in the electrical power systems sector must be expanded to capture the kind of work being done and that will be done in the future in order to protect the applicants from having their bargaining rights diminished. Their bargaining rights used to cover the entire electrical power system sector when the only work done in that sector was done by or on behalf of Ontario Hydro on its property. With the evolution taking place in relation to electrical power generation and distribution, the only way the applicants can compel the responding parties to recognize them as the bargaining agents for the employees who will be doing the work that will be going on outside what was once Ontario Hydro is through certification applications that broaden the scope of their bargaining units.

Thus it appears the applicants recognized the bargaining unit in the Power Council collective agreement with EPSCA was, in fact, confined to the electrical power systems sector.

18. As I had said earlier, the description of the bargaining unit in the Power Council collective agreement with EPSCA is complex. Its scope must be gleaned from both the master portion and the trade appendices. Section 1.2 of the trade appendices, quoted earlier in paragraph 8 above specifically refers to the classifications "for work in the electrical power systems sector". In addition, the third recital of that collective agreement states:

> AND WHEREAS it is the desire of the parties to conclude an agreement with a new concept designed to bring stability, harmony, and an effective method to amicably resolve problems in the electrical power systems sector of the construction industry, in the Province of Ontario;

In the result, I am convinced the bargaining unit the Board found appropriate for these applications in its August 22, 2005 decision (the bargaining unit in the Power Council collective agreement with EPSCA) was, in fact, limited in scope to the electrical power systems sector. Furthermore, I am of the view that the certificates the Board issues in these cases should make specific reference to the electrical power systems sector so as to avoid any confusion or misunderstandings in the future. If I were to accede to the applicants' request and not insert the sector element in the bargaining unit description, the result would be ambiguity and uncertainty. In my view, the Board has an obligation to be as precise as it can be in describing an appropriate bargaining unit in a certificate so that the parties to the certificate and any third parties who may be affected by the scope of the bargaining unit will understand the nature and extent of the bargaining rights created by that certificate.

19. At the hearing of this matter, counsel for the Power Workers' Union Canadian Union of Public Employees, C.L.C. Local 1000 (the "PWU") advised the Board that it and the applicants had reached a settlement of the outstanding issues between them. The PWU stated that there was no need for the bargaining unit descriptions in these applications to make any reference to the PWU. The applicants and Ontario Power Generation, Hydro One Inc., Hydro One Networks Inc. and Bruce Power LP agreed with the PWU on that point.

20. The intervenor in Board File Nos. 0531-04-R and 1534-04-R advised the Board it was not necessary to provide any specific exclusion in the bargaining unit description for work performed under the collective agreements by which the applicants in those two applications and it are bound. As the bargaining unit would be limited to construction work performed on the property of Ontario Power Generation Inc., Hydro One Inc. and Bruce Power LP, the intervenor was satisfied the bargaining rights created by the certificates would not affect the work done at its current project and any projects it may undertake.

21. Therefore the Board finds the following units of employees are appropriate for collective bargaining in these applications:
Labourers' Applications: Board File Nos. 3448-03-R, 3450-03-R, 3457-03-R, 3502-03-R, 0094-04-R, 0096-04-R, 0112-04-R, 0113-04-R, 0114-04-R, 1026-04-R, and 1045-04-R

All employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities.

> * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses:

- construction of new facilities
- additions to existing facilities
- major – modifications
  – rehabilitation
  – reconstruction of existing facilities

For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations.

The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for:

(a) the supply of aggregate and concrete used in the construction of said facilities; and

(b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers.

The term "employee" shall include all employees of the Responding Party in the classifications set out below:

Group I Watchman

Group II Labourer
Heaterman
Power Sweeper Operator

Siamese Blowgun Operator
Carpenter Helper
Flagman
Signalman
Spotter
Janitorial Cleaner (Construction Site)
Area Captain (BHWP)

Group III Formworker (Lakeview and Pickering Projects only)

Group IV Conveyor Belt Attendant
Scaler
Wrecker – Demolition of Complete Buildings
Yardman – Used Building Materials
Form Stripper
Powderman Helper
Air Trac Driller Helper
Bricklayer Helper/Mason Tender
Stressing Operating Helper – Post-Tensioning and Prestressing
Caulker including Tile and Concrete Pipe
Grouter Operator (not machine)
Portable Compressor Operator
Small Pump Operator
Pipe Layer
Small Mixer Operator

Group V Concrete Worker
Floatman
Puddler
Screedman
Mortarman

Group VI Air Tool Operator
Concrete Core Drill Machine Operator
Jackhammer Operator
Tamper Operator
Chainsaw Operator
Vibrator Operator
Electrical Tool Operator
Pressurized Grouterman
Bomag Operator
Scootcrete Operator
Chipping Hammer Operator
Concrete Breaker
Jackleg Operator
Rocksplitter Operator
Farm Tractor Operator
Tool Crib Attendant
Building Labourer (Lines and Stations only)
Stump Cutter Operator
Stress Operator Post-Tensioning and Prestressing
Welder – Post-Tensioning and Prestressing

Group VII	Powderman
Group VIII	Air Trac/Hydraulic Drills and Self-Propelled Hydraulic Drills
Group IX	Diamond Driller

The term "employee" shall not include Labourers employed by an Employer signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement.

The term "foreman" shall include all foremen between the ranks of, but not including, working foreman and general foreman, save and except those described hereunder.

> Labourer foremen employed by an Employer signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement.

Carpenters' Applications: Board File Nos. 0917-04-R, 0925-04-R, 0926-04-R, 1534-04-R and 1688-04-R

All employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities.

> * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses:

- construction of new facilities
- additions to existing facilities
- major
  - modifications
  - rehabilitation
  - reconstruction of existing facilities

For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations.

The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for:

(a) the supply of aggregate and concrete used in the construction of said facilities; and

(b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers.

The term "employee" shall include all employees of the Responding Party in the following classifications:

Carpenter (includes Timberman, Cribman, Sawfiler and Pile Driver)
Carpenter Welder and Burner
Diver
Diver Welder and Burner

Acoustic and Drywall Worker
Acoustic and Drywall Welder and Burner
Resilient Floor Worker and Carpet Layer
Subforeman
Apprentice
Pile Driver Welder

The term "employee shall not include Carpenters employed by the Responding Party if it is signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement.

"Foreman" shall include all foremen between the ranks of, but not including, working foreman and general foreman, save and except Carpenter foremen employed by the Responding Party if it is signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement.

Millwrights' Applications: Board File Nos. 0506-04-R, 0507-04-R, 0527-04-R, 0529-04-R, 0531-04-R, 0532-04-R, 0533-04-R, and 0534-04-R

All employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities.

* the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses:

- construction of new facilities
- additions to existing facilities
- major
  - modifications
  - rehabilitation
  - reconstruction of existing facilities

For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations.

The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for:

(a) the supply of aggregate and concrete used in the construction of said facilities; and

(b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers.

The term "employee" shall include all employees of the Responding Party in the classification of Millwright, which shall include welders, burners, subforemen, journeymen and apprentices employed in the Millwright Trade.

The term "foreman" shall include all millwright foreman of the Responding Party between the ranks, but not including, working foreman and general foreman.

22. The parties in Board File Nos. 0114-04-R and 0527-04-R disagreed over whether the correct name of the responding party should be Siemens Canada Limited or Power Generation Services Division of Siemens Canada Limited. The responding party in these two applications indicated it wished to make detailed submissions on the correct way of identifying the responding party and requested the opportunity to do so. It suggested that the Board issue certificates using the name of the division pending written submissions setting out its reasons for suggesting the division name was appropriate in the circumstances. The responding party advised the applicants it would provide them with its submissions not later than February 15, 2007. The applicants were content to have the division name appear on the certificates subject to their right to apply for reconsideration after reviewing and considering the responding party's submissions. The Board therefore amended the name of the responding party in these two applications to Power Generation Services Division of Siemens Canada Limited. The parties agreed that should the applicants request reconsideration of the Board's decision with respect to the name of the responding party in these two applications, the Board would determine the request on its merits and not on the basis of whether the applicants have met the initial test for the Board to reconsider nor on the basis of timeliness, provided their request for reconsideration is filed on or before March 15, 2007. Should the applicants seek reconsideration of the Board's decision in which it identifies the responding party in these two applications as Power Generation Services Division of Siemens Canada Limited, this panel of the Board will be seized with that determination.

23. The parties in Board File Nos. 3457-03-R and 0926-04-R also disagreed about the correct name of the responding party. The applicants contended the correct responding party was, at the very least, Hydro One Inc., the parent corporation of the various operating companies that carry on its business. The responding party submits that Hydro One Networks Inc. is the actual employer of the employees affected by these two applications and suggests that as the actual employer, Hydro One Networks Inc. should be the name of the employer appearing on the certificate. Hydro One Inc. says it has no employees and the construction work undertaken in respect of its area of responsibility is carried out by Hydro One Networks Inc.

24. The Labourers refer to the single employer declarations they obtained in earlier proceedings before the Board (see Board File Nos. 3161-00-R et al. decision dated October 28, 2003). In those proceedings, Hydro One Inc. and Hydro One Networks Inc., together with Hydro One Network Services Inc., Hydro One Remote Communities Inc., Ontario Hydro Energy Inc., Hydro One Delivery Services Inc., and Hydro One Telecom Inc. had been declared one employer for purposes of the Act. The Labourers submitted at the hearing that Hydro One Inc. and Hydro One Networks Inc. should be named as the responding party in view of the single employer declaration and the submission by Hydro One Networks Inc. that it was the actual employer of the employees affected by these applications. In my view, the position taken by the Labourers is unassailable. Given the single employer declaration the Labourers had obtained, the correct name of the responding party in Board File No. 3457-03-R is Hydro One Inc. and Hydro One Networks Inc. and the Board has made the change to reflect the correct name.

25. Hydro One Inc. and Hydro One Networks Inc. submitted that the Carpenters had not obtained a single employer declaration and therefore the Board should not name them both as the responding party in Board File No. 0926-04-R. They were not prepared to accept that for purposes of this application for certification they were one employer. The Carpenters indicated they would be filing an application under section 1(4) of the Act for a single employer declaration forthwith. They were prepared to accept the factual assertions made by Hydro One Inc. and

Hydro One Networks Inc. that the direct employer of their members affected by this application was Hydro One Networks Inc. and were content to have the certificate they obtain in this proceeding to show Hydro One Networks Inc. as the responding party, so long as it was clear that their agreement in this application was without prejudice to their ability to obtain a single employer declaration in respect of Hydro One Inc. and Hydro One Networks Inc. Therefore, the name of the responding party in Board File No. 0926-04-R is Hydro One Networks Inc. and the Board has made the change to reflect the correct name. The determination of the correct name of the responding party in that proceeding is without prejudice to the Carpenters should they file an application for a single employer declaration under section 1(4) of the Act in respect of Hydro One Inc. and Hydro One Networks Inc.

26. The applicant in Board File No. 1026-04-R by letter dated April 24, 2006 sought to amend the name of the responding party to reflect the legal entity which operates the Dundas Drilling business. Therefore, at the request of the applicant and as the responding party in Board File No. 1026-04-R did not appear at the hearing and did not file any objection to the request made by the applicant, the name of the responding party in Board File No. 1026-04-R has been changed to F.D. Light & Power Ltd. o/a Dundas Drilling.

27. After the hearing of these matters had concluded, counsel for Comstock Canada Limited ("Comstock") in Board File No. 1688-04-R, by letter sent to the Board shortly before 5 p.m. on January 15, 2007, advised that the applicant, by letter dated April 20, 2006 addressed to the Registrar, had requested leave to withdraw its application on the basis that it was untimely and attached that April 20th letter. Counsel for Comstock pointed out that the Board had not addressed the applicant's request for leave to withdraw and had, in fact, listed the application in Board File No. 1688-04-R for hearing at the same time as the other 23 applications which were before me and are the subject of this decision. Neither Comstock nor the applicant had raised the matter of the withdrawal of this application during the hearing. The letter of April 20, 2006 from the applicant had never been brought to my attention. In these circumstances, unless the applicant advises the Board to the contrary within 10 days of the date of this decision, the Board will act on the applicant's letter and issue a decision permitting the withdrawal of this application.

28. The Board understands that more than 50 percent of the ballots cast in each of the representation votes held in these applications were cast in favour of the respective applicants. Therefore, the Board will be issuing separate decisions certifying the applicants in each of these applications, other than in Board File No. 1688-04-R, in respect of the appropriate bargaining units set out above.

3362-05-R; 3156-06-R; 3237-06-R; 3238-06-U Drywall Acoustic Lathing and Insulation, Local 675, United Brotherhood of Carpenters and Joiners of America, Applicants v. Tabreo Management Ltd. and **Target Drywall & Acoustics Ltd.**, Responding Parties; Canadian Construction Workers' Union, Applicant v. **PBS General Contractors Inc.**, Responding Party; Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America and Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America, Applicants v. Tabreo Management Ltd., Target Drywall & Acoustics Ltd. and **PBS General Contractors Inc.**, Responding Parties.

Certification – Construction Industry – Intervenor – A number of trade unions and employer bargaining agencies sought to intervene as *amicus curiae* in this certification application, arguing they wanted to present the Board with views regarding the undesirability of having the applicant trade union succeed and the potential destabilization in the construction industry should the applicant be found to be a trade union (its status has not yet been established) – The Board rejected the intervention of those seeking *amicus curiae* standing, relying on its own significant knowledge and experience in construction – When the Formwork Council challenged some of the voluntary recognition agreements relied on by the applicant, the applicant was invited to respond to the challenge – The Carpenters alleged the respondent employer was related to companies they were pursuing in another Board application – Application for certification joined with other Carpenter applications – Matter continues

BEFORE: *Mary Ellen Cummings*, Alternate Chair, and Board Members *John Tomlinson* and *Richard Baxter*.

DECISION OF THE BOARD; January 23, 2007

1. This is an application for certification filed under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") that the applicant elected to have dealt with under section 128.1 of the Act.

2. The applicant seeks to represent "all construction employees of the employer in the residential sector in OLRB Geographic Area No. 8, save and except non-working foremen and persons above the rank of non-working foremen".

3. The responding party, PBS General Contractors Inc. ("PBS") filed its response with the Board within the time stipulated by Rule 25.5 of the Board's Rules of Procedure and provided the Board with the requisite information in accordance with subsection 128.1(3) of the Act.

4. The applicant has not established that it is a trade union within the meaning of section 1 of the Act, nor has it established that it is a trade union "...that according to established trade union practice pertains to the construction industry", pursuant to section 126 of the Act. The applicant has filed materials on which it intends to rely to prove that it is both a trade union within the meaning of section 1(1) of the Act and meets the definition of "trade union" established by section 126(1).

5. Interventions have been filed by the Carpenters' District Council of Ontario, the Labourers' International Union of North America, Local 183, the Labourers' International Union of North America, Ontario Provincial District Council, the Provincial Building and Construction Trades Council, the Ontario Pipe Trades Council, the International Union of Painters and Allied Trades, the Ontario Provincial Council of the International Brotherhood of Painters and Allied Trades, the IBEW Construction Council and the Central Ontario Building Trades. The Toronto and Area Road Builders Association, the Heavy Construction Association of Toronto, and the

Ontario Masonry Contractors' Association have also filed interventions as has the Formwork Council of Ontario.

6. The interventions filed by Labourers' International Union of North America, Local 183, the Labourers' International Union of North America, Ontario Provincial District Council, the Provincial Building and Construction Trades Council, the Ontario Pipe Trades Council, the International Union of Painters and Allied Trades and the Ontario Provincial Council of the International Brotherhood of Painters and Allied Trades, the IBEW Construction Council of Ontario and the Central Ontario Building Trades are similar and can be dealt with together. These parties seek to intervene as *amicus curiae*, to provide a broad perspective on relationships in the construction industry, and ultimately to tell the Board about "…the undesirable impact this application will have on the construction industry as a whole", to quote from a number of the interventions. They assert that the applicant is not a trade union within the meaning of section 1 and section 126, and that its president is not authorized to act in the applicant's name. It also appears that they intend to rely on findings made by an adjudicator in an unrelated proceeding to cast aspersions on the applicant's president. They also suggest there may be issues of improper employer support.

7. The Toronto and Area Road Builders Association, the Heavy Construction Association of Toronto, and the Ontario Masonry Contractors' Association are employer associations who seek to intervene as *amicus curiae*. They are concerned about the destabilization that might be created in the construction industry if the applicant is found to be a trade union and seeks to raid other unions to win bargaining rights not just in the residential sector, but in other sectors, as local newspapers have suggested. They offer the Board their unique perspective as representative of employers with significant experience in labour relations in the construction industry.

8. The Board has typically been unwilling to let strangers to an application for certification intervene in such proceedings. In our experience, strangers raise issues that are not relevant to the certification matters the Board must determine, and often bring an agenda different from that of the necessary parties. The Board has only permitted trade unions who can establish that they represent one or more of the affected employees to intervene. None of the proposed trade union intervenors asserts that it represents one or more of the employees of PBS. Of course, the Board has discretion to permit interventions as *amicus curiae*, or friends of the tribunal. The Board's practice and experience with the utility of *amicus curiae* is summarized in a July 7, 1995 decision in *Canadian Union of Shinglers & Allied Workers*, (Board File No. 0014-95-R, unreported):

> 17. …a party which seeks to intervene in a proceeding before the Board must demonstrate a real discernible legal interest in the proceedings, or persuade the Board that it is able to provide the Board with assistance which is required to ensure that all of the issues are properly presented, such that it should be granted a kind of *amicus curiae* status. In representation proceedings, a trade union or organization of trade unions must generally establish that it is the bargaining agent for or otherwise represents at least some of the employees who may be affected by the application. *Amicus curiae* status, which is invoked as a matter of the Board's discretion, has rarely been granted…

> 18. In order to provide a basis for status, an interest must be direct and substantial. An interest which is merely political, which is anticipatory or speculative, or which is concerned with an indirect economic or commercial effect is not sufficient to entitle a party to intervene in a proceeding. Nor is the fact that a decision in a proceeding may be used or referred to as a precedent in another proceeding (*New Dominion Stores*, *supra*, at page 521; and, more generally, see *Re Schofield And Minister Of Consumer And Commercial Affairs*, (1980) 28 O.R. (2d) 764 (Ontario Court of Appeal)).
>
> 19. To support an intervention on an *amicus curiae* basis, the Board must be persuaded that the parties seeking to intervene can provide it with real and substantial input on important issues which the Board is unlikely to receive from the direct parties, and that the participation of such an intervenor will not cause undue delay or prejudice the rights of a direct party.

9. With respect, the Board is satisfied that it can determine the remaining issues in this application, that is, whether the applicant is able to prove that it is a trade union, on the basis of the submissions and, perhaps evidence, of the parties, and the Board's significant knowledge and experience in the domain of construction labour relations. Further, to permit intervenors to make submissions about the "undesirable impact" of this application on the construction industry might suggest that the Board has some discretion to have regard to matters other than whether the applicant is a trade union that pertains to the construction industry, whether it has applied for an appropriate bargaining unit and whether it has filed the requisite membership support. The Board will not permit the Labourers' International Union of North America, Local 183, and the Labourers' International Union of North America, Ontario Provincial District Council, the Provincial Building and Construction Trades Council, the Ontario Pipe Trades Council, the International Union of Painters and Allied Trades the Ontario Provincial Council of the International Brotherhood of Painters and Allied Trades, the IBEW Construction Council of Ontario, the Central Ontario Building Trades, Toronto and Area Road Builders Association, the Heavy Construction Association of Toronto, and the Ontario Masonry Contractors' Association to intervene in any capacity.

Intervention of the Formwork Council of Ontario

10. The Formwork Council of Ontario has sought to intervene. It alleges that some of the voluntary recognition agreements that the applicant has filed to seek to prove that it is a trade union that pertains to the construction industry involve employers with whom the Formwork Council of Ontario holds conflicting bargaining rights. It should be noted that the Formwork Council of Ontario is not suggesting that it has bargaining rights with PBS, the responding party in this case.

11. The Formwork Council of Ontario has also filed applications seeking to terminate the bargaining rights the applicant relies on in the voluntary recognition agreements, unfair labour practice complaints and an application seeking a declaration of single employer or sale of business. The Formwork Council asks that it be an intervenor in this application for certification and that its own applications be listed for hearing with the application for certification.

12. We appreciate that voluntary recognition agreements are important for this applicant because, on a number of occasions, the Board has relied on such agreements to determine if an applicant is a trade union that pertains to the construction industry (see Masonry Industry

Employers' Council of Ontario, [2001] OLRB Rep. Jan./Feb. 78 (February 21, 2001)). The Formwork Council of Ontario has "attacked" four of the nine voluntary recognition agreements that the applicant relies on. The Board may be able to make a determination of this application for certification without regard to the four voluntary recognition agreements the Formwork Council has attacked. The applicant is directed to advise the Board by no later than **Monday, February 5, 2007**, if it is prepared to withdraw its reliance on those challenged agreements for the purposes of this application.

13. If the Board were to proceed as the Formwork Council of Ontario wants, then this application for certification will get mired in the proceedings attacking those voluntary recognition agreements, which seems an inefficient approach, particularly where the Formwork Council of Ontario is not asserting conflicting bargaining rights with PBS, the target of this application. We are not yet satisfied that the Formwork Council of Ontario is entitled to intervene in this application for certification.

Intervention of the Carpenters

14. The intervention filed by the Carpenters' District Council of Ontario ("the Carpenters") is different. Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America, a member union of the Carpenters, have brought an application seeking a determination that Tabreo Management Ltd. ("Tabreo") and Target Drywall and Acoustics Ltd. ("Target") are a single employer, and/or for a declaration that there has been a sale of business from Tabreo to Target (Board File No. 3362-05-R). The Carpenters allege that the responding party in this certification application, PBS, carries on associated or related activities with Target. They allege that PBS and Target operate out of the same premises, share telephone and facsimile numbers and have key persons in common. The Carpenters have filed an application seeking a declaration that PBS and Target are a single employer, and a determination that the bargaining rights it holds with Tabreo should be extended to PBS (Board File 3237-06-R). The Carpenters have also brought a related unfair labour practice complaint, naming the same responding parties (Board File 3238-06-U). The scope of the bargaining rights that the Carpenters seek to have extended to PBS overlap with the scope of the bargaining unit sought by the applicant in this application for certification.

15. It may be that the application brought by the Carpenters in Board File 3237-06-R will have to be determined before or in conjunction with this application for certification. If, for example, the Carpenters can establish that a sale of business pre-dated the application for certification, the Board might dismiss the application for certification. On the other hand, in deciding whether or not to make a single employer declaration, the Board might take into account that employees have sought to be represented by an entity other than the Carpenters.

16. The responding parties in Board File 3237-06-R and 3238-06-U are directed to file their response in accordance with the Rules. The Registrar is directed to place Board files 3237-06-R, 3238-06-U and 3156-06-R before the panel hearing Board File 3362-05-R. That hearing will take place on **March 19, 2007** at the Board's offices, 505 University Avenue, 2nd Floor, Toronto. That panel will determine the best way to proceed with the applications.

17. This panel is not seized.

18. The Manager of Field Services is directed to appoint a Labour Relations Officer to assist the parties.

19. PBS is directed to post this decision in a location where it is most likely to come to the attention of the affected employees.

3156-06-R Canadian Construction Workers' Union, Applicant v. **PBS General Contractors Inc.**, Responding Party.

Certification – Construction Industry – Intervenor – A number of trade unions and employer bargaining agencies sought to intervene as *amicus curiae* in this certification application, arguing they wanted to present the Board with views regarding the undesirability of having the applicant trade union succeed and the potential destabilization in the construction industry should the applicant be found to be a trade union (its status has not yet been established) – The Board rejected the intervention of those seeking *amicus curiae* standing, relying on its own significant knowledge and experience in construction – When the Formwork Council challenged some of the voluntary recognition agreements relied on by the applicant, the applicant was invited to respond to the challenge – The Carpenters alleged the respondent employer was related to companies they were pursuing in another Board application – Application for certification joined with other Carpenter applications – Matter continues

BEFORE: *Mary Ellen Cummings*, Alternate Chair, and Board Members *John Tomlinson* and *Richard Baxter*.

DECISION OF THE BOARD: January 26, 2007

1. The Board issued a decision on January 23, 2007 setting out a number of issues concerning this application for certification, including a statement at paragraph 12 that the Formwork Council of Ontario had challenged four of the nine voluntary recognition agreements on which the applicant seeks to rely to establish that it is a trade union that pertains to the construction industry, pursuant to section 126 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended, ("the Act"). The Board asked the applicant to indicate by no later than February 7, 2007 if it was prepared to withdraw its reliance on those challenged agreements for the purpose of this application.

2. By letter dated January 24, 2007, the applicant requested clarification of the Board's decision. It had understood that the Formwork Council of Ontario ("the Formwork Council") had challenged only one voluntary recognition agreement, concerning Rock-Base Construction Ltd.

3. The Board made a couple of errors. The Formwork Council of Ontario, in Board File 3256-06-R, has brought an application pursuant to section 66 of the Act seeking to terminate the applicant's bargaining rights in respect of a voluntary recognition agreement with Rock-Base Construction Ltd. The applicant filed two memoranda, dated November 13, 2006 and December 1, 2006. It may be that together they constitute a single voluntary recognition agreement, but we do not wish to attribute any characterization at this time. Two documents were

filed. The Board is not aware of any other applications brought by the Formwork Council pursuant to section 66 that concern this application for certification.

4. However, the Universal Workers' Union, Labourers' International Union of North America, Local 183 ("Local 183") has also brought an application pursuant to section 66 concerning T.A.C.S. Construction Ltd. (Board File. 3260-06-R). Local 183 challenges the voluntary recognition agreement that the applicant has relied on in this application in respect of T.A.C.S. Construction Ltd. Again, the applicant filed two memoranda, dated November 9, 2006 and December 1, 2006. Again, the Board does not wish to attribute any characterization to the documents at this time.

5. The Board's error, then, came from not realising that the challenge in respect of T.A.C.S Construction Ltd. was filed by Local 183, and not by the Formwork Council. Our error requires some modification to our decision of January 23, 2007 in respect of file 3260-06-R only.

6. The Board directs the applicant to advise the Board by no later than **February 5, 2007** if it is prepared to withdraw its reliance on the voluntary recognition agreements challenged by Local 183 and the Formwork Council.

7. The Board has not yet determined whether the Formwork Council or Local 183 may intervene in this application. However, we have expressed our reluctance to see this application for certification mired in the proceedings attacking the voluntary recognition agreements, which seems an inefficient approach, especially where the Formwork Council and Local 183 are not asserting conflicting bargaining rights with PBS, the target of this application.

3132-06-ES Quebecor World Inc., Applicant v. Carlo Binetti and Director of Employment Standards, Responding Parties.

Employment Standards – The Employer applied for review of an Order to Pay – Subsection 116(1) of the *Employment Standards Act, 2000* requires, as a pre-requisite to filing the application, the payment of the amount owing to the Director of Employment Standards in trust or the provision of an irrevocable letter of credit acceptable to the Director – The Employer did not pay the full amount specified in the Order to Pay; rather, it withheld an amount in respect of statutory deductions – The Director contended that the amount withheld in respect of statutory deductions was excessive and sought an order from the Board to increase the total amount payable into trust to 70% of the total amount owing – The Board held that nothing in subsection 116(1) expressly allows for the payment into trust of anything less than the full amount of the Order to Pay, nor is there any prejudice to require an applicant to pay the full amount – The Employer was ordered to pay the full amount into trust in order to perfect the application

BEFORE: *Mary Anne McKellar*, Vice-Chair.

DECISION OF THE BOARD; February 13, 2007

1. This is an application under section 116 of the *Employment Standards Act, 2000* ("the Act") for review of Order to Pay No. 33435 in the amount of $11,000.00, representing $10,000.00 in respect of wages found owing to the responding party employee and $1000.00 in respect of the administration fee.

2. The applicant employer has not paid the full amount of the Order to Pay into trust. It has withheld certain amounts in respect of statutory deductions it may be required to remit should the Order to Pay be confirmed, including amounts in respect of federal and provincial income tax, Canada Pension Plan and Employment Insurance deductions. The amount paid into trust is $6,028.97.

3. The Director of Employment Standards ("the Director") has written to the Board, and requested that the applicant be directed to pay additional funds into trust in order to "perfect the application for review". The Director does not seek to have the applicant pay the full $11,000.00 into trust. It is prepared to allow the applicant to withhold 30% (or $3,000.00) of the wages component of the Order to Pay on the basis that that is the maximum permissible CRA deduction, but submits that the balance of the wages component ($7,000.00) plus the full amount of the administrative fee ($1,000.00) should be paid into trust. The Director therefore requests that the Board order the applicant employer to make up the difference between what has been paid ($6,028.97) and what the Director says should have been paid ($8,000.00). That difference is $1,971.03.

4. Orders to Pay are issued under section 103 of the Act. Those Orders to Pay may be the subject of applications review commenced in accordance with subsection 116(1) of the Act, which provides:

> **116.** (1) A person against whom an order has been issued under section 103, 104, 106, 107 or 108 is entitled to a review of the order by the Board if, within the period set out in subsection (4), the person,
>
> (a) applies to the Board in writing for a review;
>
> (b) in the case of an order under section 103, pays the amount owing under the order to the Director in trust or provides the Director with an irrevocable letter of credit acceptable to the Director in that amount; and
>
> (c) in the case of an order under section 104, pays the lesser of the amount owing under the order and $10,000 to the Director in trust or provides the Director with an irrevocable letter of credit acceptable to the Director in that amount.

5. Neither subsection 116(1), nor any other section of the Act or regulations, expressly allows for the payment into trust of anything less than the full amount of the Order to Pay. It is not apparent to me why the Director is prepared to accept that anything less than the full amount should be paid into trust, although I realize that this has been its practice (and indeed that of Board) for some time. I further do not understand why the Director is prepared to permit the withholding of some, but not all, statutory deductions that would be required should the Order to Pay ultimately be confirmed. Because all the possible statutory deductions are not withheld and

because there always exists in any case the possibility that the Board will vary an Order to Pay. I do not see any rational connection between what is withheld and what might ultimately have to be remitted to various government agencies. I therefore do not see what practical purpose there is to ever accepting anything less than the payment into trust of the gross amount of the Order to Pay as satisfying the prerequisites of subsection 116(1) in respect of an application for review. Furthermore, the practice causes some difficulty for the Board. I have no reason to doubt the accuracy of this applicant's calculation of the statutory deductions it would be required to make if the Board were to confirm that it owes $10,000.00 in wages to the claimant. If I were to doubt them, however, I have no basis on which to assess their accuracy. This could become an issue in other applications because the Board routinely screens applications and does not process them until it has assured itself that: (a) they have been filed in a timely fashion, or it is appropriate to extend the time limits in the Act; and (b) any amount required to be paid into trust has been paid. The second inquiry is obviously made more difficult to the extent that the amount required to be paid into trust is anything other than the gross amount of the Order to Pay, and this problem is exacerbated by the fact that the Board typically only receives a copy of the official receipt from the Director showing what has actually been paid into trust, with no indication of how any amounts withheld have been calculated.

6. I therefore think there are a number of reasons why an applicant seeking to review an Order to Pay made under section 103 of the Act should be required to pay the gross amount of that order into trust (or supply an acceptable irrevocable letter of credit in that amount). Subsection 116(1) of the Act seems to require it, and I do not see that there is any prejudice to requiring an applicant to do so, as the Act provides for the accrual of interest on amounts held in trust pending the disposition of the application. Furthermore, should the matter not be resolved without a hearing, the question of how amounts held in trust should be distributed having regard to an employer's obligation to make statutory remittances can be addressed once the Board has determined the quantum of wages owing.

7. In these circumstances, if the applicant wishes to proceed with this application pay a further $4,971.03 to the Director in trust in respect of this application for review, and to do so by February 26, 2007.

8. In the event that this matter does not settle and a hearing is convened, the applicant and the Director (should the Director attend), in addition to presenting any evidence and argument with respect to the merits of the case, may make submissions on the following: (1) whether the Act permits payment into trust of less than the gross amount of the Order to Pay; and (2) if so, what formula the Board should apply to determine the amount that it is permissible to withhold.

9. I am not seized.

0566-06-U; 0890-06-U; 0891-06-U United Food & Commercial Workers Canada, Local 175, Applicant v. **Ready Bake Foods Inc.**, Responding Party; Brian Lorentz, Don Montgomery, Dwayne Huxted, Frank Papa, Chris Cull, John Gondek, Mike Nowakowski, Brian Graham, Applicants v. **Ready Bake Foods Inc., (a division of**

George Weston Limited) and George Weston Limited, Responding Parties v. United Food & Commercial Workers Canada Local 175, Intervenor; Brian Lorentz, Don Montgomery, Dwayne Huxted, Frank Papa, Chris Cull, John Gondek, Mike Nowakowski, Brian Graham, Applicants v. United Food & Commercial Workers Canada Local 175, Responding Party v. **Ready Bake Foods**, Intervenor.

Duty of Fair Representation – Duty to Bargain in Good Faith – Unfair Labour Practice – These three applications concern (1) an unfair labour practice complaint brought by the union alleging the employer's failure to bargain in good faith; (2) an unfair labour practice complaint launched by individual employees against the employer; and (3) a complaint by the same employees that the trade union had not represented them fairly – Shortly after the union was certified, the employer announced the closure of its transportation division and the permanent lay-off of all the bargaining unit members – The union and employer negotiated, and the employees ratified, a closure agreement rather than a collective agreement – The Board found that the union failed to make out a *prima facie* case of a violation of s. 17 because the parties had reached an "agreement" that was enforceable by way of arbitration – The Board further found that individual employees have no standing to allege violations of s. 17 and 86, and have limited standing (not applicable in the present case) to complain about violations of s. 70 – Allegations of a violation of s. 72 were allowed to proceed, with a direction to the employees for further particulars – Finally, the alleged violation of s. 74 was allowed to proceed as well (in light of the arbitrability of the closure agreement), once again with a direction for further particulars – Matter proceeds

BEFORE: *Mark J. Lewis*, Vice-Chair.

DECISION OF THE BOARD: January 19, 2007

1. This decision concerns three interrelated matters. Board File No. 0566-06-U is an application under section 96 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") brought by the United Food and Commercial Workers Local 175 (the "Union") against Ready Bake Foods Inc. ("Ready Bake") alleging a violation of the duty to bargain in good faith imposed by section 17 of the Act. Board File No. 0890-06-U is an application under section 96 of the Act filed against Ready Bake by various individuals that were previously employed by it as truck drivers in a bargaining unit that was represented by the Union. Board File No. 0891-06-U is an application filed by the same group of individuals against the Union alleging a violation of the duty of fair representation imposed by section 74 of the Act. This decision concerns certain preliminary requests which have been made in these matters.

FACTS MATERIAL TO ALL THREE APPLICATIONS

2. On June 13, 2005, the Union was certified as the exclusive bargaining agent for a unit of truck drivers employed by Ready Bake at its facility at 2095 Meadowvale Boulevard in the City of Mississauga.

3. All of the individual applicants were employed in the truck drivers' bargaining unit.

4. Shortly after the Union was certified Ready Bake announced that it would be closing its transportation division and therefore all of its drivers would be laid off.

5. No negotiations concerning the conclusion of a "standard collective agreement" for the truck drivers' bargaining unit ever took place between the Union and Ready Bake. However, all parties agree that Ready Bake and the Union did in fact meet in February of 2006 and reached an agreement relating to the closure of the transportation department (the "Closure Agreement"). The Closure Agreement was in writing. This Agreement was subject to, and was in fact, ratified by the members of the truck drivers' bargaining unit by way of a secret ballot vote.

6. Amongst other things, the Closure Agreement established the basic working conditions which would apply until the closure of the transportation department. This Agreement also set the amounts of certain payments which the bargaining unit employees would receive upon lay-off.

BOARD FILE NO. 0566-06-U

7. In its section 96 application the Union alleges that Ready Bake has violated the Closure Agreement by failing to pay the appropriate severance amounts and stay bonuses to certain bargaining unit employees. Ready Bake denies the Union's claim. It asserts that it correctly calculated the severance pay amounts for all employees, in accordance with the terms of the Closure Agreement. Ready Bake acknowledges that, as of June 5th, 2006, when it filed its response, certain employees had not received all of the payments they were entitled to but it claims that this was solely because it was not in possession of certain information which it had previously requested of those employees. Ready Bake asserted that the information which had been requested (which related to tax planning) was necessary to ensure that appropriate statutory deductions would be made and that, in any event, all of the employees would be paid all amounts that they were entitled to by the end of June, 2006.

8. Without prejudice to its position on the merits, Ready Bake takes the preliminary position that this application alleging a breach of section 17 of the Act should be dismissed without a hearing as it fails to set out a *prima facie* case establishing a violation of section 17 and there is no basis for granting the remedies requested.

9. The Board's authority to dismiss an application without a hearing is set out in Rule 39.1 which states the following:

> **39.1** Where the Board considers that an application does not make out a case for the orders or remedies requested, even if all of the facts stated in the application are assumed to be true, the Board may dismiss the application without a hearing or consultation. In its decision, the Board will set out its reasons.

10. In this case all of the preconditions required for the Board to exercise its discretion under Rule 39.1 are present and, for the reasons set out below, Ready Bakes preliminary request dismissing this application without a hearing is an appropriate one.

11. On the face of the Union's pleadings and given the remedies requested, it is apparent that the Union is not claiming that this employer has refused to bargain with it in good faith as section 17 requires. In fact, the Union is asserting the complete opposite. Its claim is, at its core, that it and Ready Bake did bargain and reached an agreement which Ready Bake is now refusing to live up to. The Union is in no way seeking to bargain with this employer as it claims that the bargaining has successfully concluded.

12. Further, this is not a situation where it is claimed that a party has violated its obligations under section 17 by refusing to sign the written document recording the agreement which was reached in bargaining. There is no dispute that the Closure Agreement is a written document which was signed by both sides and was thereafter ratified by the bargaining unit members. All that the Union is now requesting is that the Board order the employer to pay the employees as per the terms and conditions which it claims both sides have already agreed to.

13. Similarly, Ready Bake does not dispute that it is bound to an "agreement" with the Union governing this bargaining unit. It claims that the only disputes between these two parties relate to the correct interpretation of the terms of their agreement and the forum in which to resolve this dispute over the terms. On the question of the correct forum, Ready Bake asserts that the Closure Agreement is in fact a "collective agreement" and that any disputes concerning its interpretation must proceed to arbitration. Ready Bake then goes on to state that, as the Closure Agreement does not contain explicit grievance and arbitration provisions, section 46 of the Act deems it to include the arbitration provisions set out in that section of the Act.

14. The Union may not have, and in all likelihood did not, anticipate Ready Bake's legal position when it initially filed its application. However, now that Ready Bake has formally set out, in its response, that it is bound to an agreement with the Union and that this agreement can be (and in fact must be) enforced by way of arbitration, not only is there no *prima facie* violation of section 17 of the Act but it is also apparent that no real labour relations purpose would be served by this application proceeding further. The Closure Agreement, being a signed and dated written agreement governing the terms and conditions of work, which was ratified by a secret ballot vote of bargaining unit members, meets the basic statutory requirements of a collective agreement. Section 46 of the Act imposes no time limits, or other procedural limitation, which would prevent a "grievance" concerning the Union's core issue, the amounts which the employees are entitled to, being determined at arbitration. Further, the Union has not requested that the Board exercise any jurisdiction or provide any remedy which are beyond the jurisdiction and powers of an arbitrator once it is accepted, as Ready Bake has now done, that there is a valid collective agreement in place which the Union is entitled to enforce.

15. Therefore, based on all of the above, this application is dismissed.

BOARD FILE NO. 0890-06-U

16. As noted above Board File No. 0890-06-U is an application under section 96 of the Act brought by certain employees in the bargaining unit represented by the Union alleging that Ready Bake and a separate company, George Weston Limited, alleged to be the parent company of Ready Bake, have violated sections 17, 70, 72 and 86 of the Act. Ready Bake and Weston Foods Inc, which it is claimed is the correct name of Ready Bake's parent company, have requested that this entire application, and/or various portions of it, be dismissed without a hearing

for various reasons. Once again, the Board's authority under Rule 39.1 is applicable to any assessment of these requests.

The Responding Parties

17. The responding parties claim that Ready Bake, which was the employer of the individual applicants, was, and remains, a subsidiary of Weston Foods Inc. while the applicants assert that it was a subsidiary of George Weston Limited. There are, however, no material facts or particulars which in any way allege that either George Weston Limited or Weston Foods Inc. (as opposed to Ready Bake) have violated any section of the Act. Accordingly, this application is dismissed in its entirety as against George Weston Limited and/or Weston Foods Inc.

Sections 17, 70 and 86

18. Ready Bake has requested that this application, as it relates to alleged violations of sections 17, 70 and 86 of the Act, be dismissed on the basis that these individual applicants lack the necessary standing to bring an application alleging violations of these sections.

19. The Board has very clearly dealt with the question of standing in respect of all three of these sections of the Act.

20. In *Canadian General Electric Company*, [1980] OLRB Rep. Aug., 1179, the then Chair of the Board, Mr. George W. Adams, stated the following with respect to the ability of an individual bargaining unit employee to allege a violation of the duty to bargain in good faith established by section 17 of the Act, at paragraphs 12 and 13 of his decision:

> 12. We have reviewed the evidence as agreed to and the helpful submissions of counsel and have concluded that this complaint must be dismissed. Regardless of what rights the employees may or may not have according to the law of trusts, this Board is satisfied that they have no proper claim under section 14 [now section 17] of *The Labour Relations Act* on the allegations made and that their claims ought not to be inquired into under section 79 [now section 96].
>
> 13. Section 14 reads:
>
> > "The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement."
>
> Sections 13, 15, 35, 37, and 42, together with the scheme of the Act reflected in many other provisions, make it clear that the parties to a collective agreement are the employer and the trade union, although the employees in the defined bargaining unit are undoubtedly bound by the agreement. See for example *Re Governing council of the University of Toronto and Service Employees Union, Local 204* (1974), 5 L.A.C. (2d) 304 (Weatherill). Thus, on the clear words of the statute, we are of the view that the obligations and duties

> contained in section 14 are matters of legal interest only to these parties.

21. The individual applicants' allegations concerning section 70 of the Act all allege that Ready Bake has interfered with the Union. The standing of an individual employee to bring such allegations alleging a violation of this section of the Act was directly dealt with in *Benjamin Blasdell*, [2004] OLRB Rep. Nov. Dec. 1015 (November 1, 2004) in which Vice-Chair Brian McLean stated the following at paragraphs 40 and 41:

> 40. The applicant's first argument under section 70 of the Act is most readily dealt with. The Board has repeatedly said that only a trade union can bring an application which alleges a violation of section 70 of the Act. As the Board held in *Dufferin Aggregates*, [1983] OLRB Rep. July 1031:
>
> > 7. On numerous occasions the Board has considered the status of an employee to bring a matter before the Board without the concurrent support of his union. There are some circumstances where the Board has declined to process an employee's individual complaint. In *T.I.A. Limousine Operators* [1979] OLRB Rep. Aug. 810 an individual employee filed a complaint with the Board alleging that his employer had breached sections 56 (now 64) and 58 (now 66) of the Act. The employee maintained that he had been discharged from his employment because his employer thought he had been active in the formation of a trade union. The employer challenged the employee's status to bring the complaint because no trade union had joined the employee in the filing of his complaint. The Board upheld the employer's objection, in part, and dismissed that aspect of the complaint alleging a breach of section 56 (now 64) of the Act. The Board held that a complaint alleging interference with the trade union must be brought by a trade union and not and individual employee. At p. 811 the Board said.
> >
> > > While the Board in *A.A.S. Telecommunications, supra*, was dealing with a managerial person it is clear from its statement that a section 79 complaint alleging a violation of section 56 of the Act must be brought by a trade union and cannot be brought by an individual employee. For this reason the complaint in respect of section 56 in the instant case is dismissed.
>
> The basis of the Board's decision *T.I.A. Limousine Operators* denying the individual the opportunity to bring an application under section 64 of the Act is that section 64, which precludes employers from interfering with trade unions, protects union rights as long as the individual was established to be an employee under the Act, the Board was willing to entertain his individual complaint under section 66 of the Act to protect his own right not to be discharged for union activity.

> 41. In my view, the applicant has no standing to make an application which alleges that the employer interfered with the trade union, only the trade union does. The trade union's reasons for not complaining about the employer's conduct are set out in the December 8 decision. There is no need to repeat them here. The Board finds nothing improper in its reasons.

22. In *Benjamin Blasdell, supra*, the employee was found to have standing to pursue that portion of his complaint which alleged that the employer had violated section 70 by providing financial or other support to the union. However no such allegations have been raised by these individual applicants.

23. Finally, in *Miller Transit Limited*, [2004] OLRB Rep. Jan/Feb., 115 (January 29, 2004); Vice-Chair Rowan stated the following concerning the standing of an individual employee to bring a complaint alleging a violation of section 70 and the statutory freeze provisions established by section 86, at paragraphs 12 and 13 of her decision:

> 12. The applicant's complaints concerning the Company's alleged breach of sections 70 and 86 of the Act are however ones that can only be brought by the trade union concerned and cannot be brought by an individual employee. As noted in *Board of Governors*, [1991] OLRB Rep. June 734, what is now section 70 of the Act is designed to protect the *institutional rights* of a trade union not the *personal rights* of individual employees. As such a complaint alleging interference with the trade union must be brought by the trade union concerned and not by an individual employee. Similarly, a complaint alleging a violation of section 86 of the Act relating to the "statutory freeze" can also only be brought by a trade union. (See for example, *Blue Line Taxi Ltd.*, [1987] OLRB Rep. April 470). The allegations made in the application to the effect that the responding party breached sections 70 and 86 of the Act are therefore hereby dismissed. The Board also notes that it is unlikely to grant the applicant's request for a further vote in the certification application in the context of the present application. It is the union that has an institutional interest in the remedy of a further vote and, in the present case, the union's certification application was and remains withdrawn.
>
> 13. In conclusion, the Board dismisses the allegations made in the application to the effect that the responding party has breached sections 70 and 86 of the Act. The Board however declines to exercise its discretion to dismiss the balance of the application.

24. Based on all of the above, the Board finds that these individual applicants lack the standing to allege violations of sections 17, 70 and 86 of the Act. These sections of the Act are designed to protect the institutional rights of unions and such allegations against Ready Bake could only be made in this situation by the Union which the applicants acknowledge was certified as their exclusive bargain agent. Therefore, the Board dismisses all allegations in this application to the effect that Ready Bake has violated sections 17, 70 and 86 of the Act.

Section 72

25. These individual applicants do however clearly have standing to pursue an application alleging a violation of section 72 of the Act.

26. Certain of the allegations concerning section 72 of the Act relate to incidents alleged to have occurred during the Union's organizing drive in the spring and summer of 2005.

27. Notwithstanding the fact that the allegations relating to events which occurred during the Union's organizing drive were made to the Board over one year after they are alleged to have occurred, and would therefore normally be considered untimely, and no explanation concerning this delay has been provided, no substantive remedy is now required and there is also no labour relations purpose which would be served by inquiring into such allegations now. Essentially, these allegations are that statements were made to certain bargaining unit employees by members of Ready Bake's management in an attempt to discouraging them from supporting the Union and its organizing efforts. Assuming that these allegations are true, then it is clear that the alleged statements did not have the "desired effect". The Union was able to file its certification application and win the resulting representation vote. There are no allegations that any employees suffered negative consequences as a result of their actual or perceived support for the Union in the period prior to the Union being certified and no relief (with the possible exception of a simple declaration of violation) with respect to any event alleged to have occurred during the pre-certification period has been requested.

28. Accordingly, pursuant to the Board's authority under Rule 39.1, all of the allegations in this application alleging violations of section 72 of the Act in the period prior to the Union being certified are dismissed. It is possible that certain of the material facts and particulars pertaining to the pre-certification period set out by the applicants may still be relevant as evidence, concerning the question of anti-union animus for example, in respect of the remaining allegations. This decision does not deal with any such evidentiary issues. All such evidentiary questions will be dealt with by the panel of the Board which ultimately hears this matter if and when they arise.

29. The individual applicants allege that, in the period following certification, Ready Bake took certain actions against them, as both individuals and collectively, because of their support for the Union. For example it is alleged that one of the applicants was disciplined by Ready Bake following the certification because management believed he was a key supporter of the Union. If true, which must be assumed at this point in these proceedings, such actions by Ready Bake would clearly constitute a violation of section 72 of the Act. Had there been a collective agreement in effect at the relevant time it may well be that the Board would have exercised its discretion and deferred such matters to arbitration. However, even Ready Bake does not allege that there was a "collective agreement" covering the truck drivers until February 12th, 2006.

30. Accordingly, the Board declines to exercise its discretion to dismiss the allegations contained in paragraphs 18(a) to (e) (inclusive) of Schedule "A" of this Application to the extent that it is alleged that Ready Bake has violated section 72 of the Act, as opposed to any matters alleged to constitute solely a violation of freeze provisions established by section 86. Based on the manner in which Schedule 'A' paragraph 18 is drafted, it is somewhat unclear as to which matters the applicants allege constitute a violation of section 72, as opposed to a violation of only section 86. Therefore, the applicants are directed to file further submission setting out which of the matters dealt with in paragraphs 18(a) to (e) they claim constitute a violation of section 72 of the Act along with any additional particulars they intend to rely upon in respect of those matters.

31. By far the most serious of all of the section 72 allegations is the applicants' claim that Ready Bake's reorganization of its transport department, which resulted in the termination of all of its truck drivers, was nothing more that a ruse. In essence it is claimed that Ready Bake took the action it did, when it did, at least in part, because of a desire to escape the consequences of the certification and to punish the truck drivers for unionizing. This may be an allegation which is extremely difficult to prove, but if it is true, which must be assumed at this point, then such actions by an employer could certainly constitute a violation of section 72 of the Act. Further, while it may be unusual for individual employees, as opposed to their union, to pursue such a claim, its unusualness does not constitute a bar. Finally, there is no basis for the Board to defer this allegation to arbitration. The Closure Agreement, while establishing certain terms and conditions of employment, does not, and cannot, deal with the legitimacy of the re-organization pursuant to section 72 of the Act and, in any event, fails to provide an arbitrator with the necessary remedial powers to adequately respond to any such violation which may ultimately be proved.

32. Accordingly, the Board declines to exercise its discretion to dismiss the allegations concerning the reorganization of the transport department set out in paragraph 33 and 34 of Schedule "A".

The *Employment Standards Act* and the Common Law

33. In addition to alleging violations of various sections of the Act, the individual applicants also allege that Ready Bake has violated various sections of the *Employment Standards Act, 2000*, S.O. 2000, c. 41, as amended (the "ESA") and various "principles of common law".

34. There are situations where it may be necessary to consider the provisions of other statutes or other legal principles in order to determine if a provision of this Act may have been violated. However, an application under section 96 is not an enforcement mechanism for claims which arise under other statutes or the common law. Regardless of what other statutes or legal principles may be considered as part of the proceedings, in an application under section 96 the Board is, and must, ultimately be concerned with a violation of a specific section or sections of this Act.

35. Accordingly, and based on the fact that this application as drafted does not clearly separate, and/or directly link, alleged violations of this Act and other statutory and common law claims, the applicants are directed to file further submission with the Board specifically setting out their positions as to how the various claims which they have made in respect of other statutes and/or the common law, constitute a violation of this Act, and specifically section 72. Thereafter, as set out below, Ready Bake and the Union will have an opportunity to respond to any submissions which the Board receives, prior to the Board making any further determinations concerning Ready Bake's preliminary request.

BOARD FILE NO. 0891-06-U

36. Board File No. 0891-06-U is an application filed by the same group of individual bargaining unit employees alleging that the Union has violated its duty of fair representation established by section 74 of the Act. In making this claim the individual applicants seek to rely on a series of particulars and material facts which span the entire period from June 2005, when

the Union was certified, up to the final departmental shut down in the summer of 2006. In its response, the Union, in addition to taking various other positions, has requested that this application, or large portions of it, be dismissed without a hearing or consultation for failing to set out a violation of section 74 on a *prima facie* basis and, in the alternative, has requested that the applicants be directed to provide further particulars concerning certain of these allegations. Ready Bake, in its intervention, generally supports the positions of the Union.

37. The allegations of the applicants fall into three broad categories: the general indifference of the Union; the negotiation and ratification of the Closure Agreement; and the implementation of the Closure Agreement. In view of this, the Union's preliminary request concerning these allegations will be dealt with on a similar basis.

General Indifference to the Bargaining Unit

38. The applicants allege that the Union has violated its duty of fair representation by showing complete indifference to this bargaining unit and the problems of the employees within it at least during the period from June of 2005 when it was certified until February 2006 when the Closure Agreement was negotiated. In particular the applicants allege that having been certified the Union never provided notice to bargain to Ready Bake and took no steps to actually commence bargaining. Further, the applicants allege that when problems which the employees began to experience, including the employer's unilateral alteration of working conditions, harassment of employees because of their perceived support for the Union, payroll issues and unjust discipline, were reported to the Union it did not respond in any way.

39. If these allegations concerning the complete indifference of the Union to the employees in this bargaining unit are true then they could constitute a violation of the section 74 duty of fair representation and as such the Board declines to exercise its discretion to dismiss them. However, as set out by the Union, the pleadings of the applicants are lacking in proper particulars. Accordingly before this matter proceeds further the applicants must fully particularize all aspects of their complaints concerning the alleged indifference of the Union to the bargaining unit, as required by the Board's Rules, and in particular must set out when, by whom, and to which representative of the Union, any workplace issues were reported, along with setting out the particular action which the employee(s) requested the Union to take and any action which was taken.

The Negotiation and Ratification of the Closure Agreement

40. The majority of the applicants' claims against the Union relate to the bargaining and subsequent ratification of the Closure Agreement. The core of these allegations is that the Union's lack of effort in bargaining led to a Closure Agreement which was deficient and that the Union should have done more to ensure that the terms of the Closure Agreement, particularly as they relate to severance payments, were more beneficial to members of the bargaining unit. In particular, it is claimed that the Union had a "fiduciary duty" to its members during the negotiation and ratification process which it failed to meet and that it has thereby violated section 74 of the Act.

41. The Board has, over the years, been extremely reluctant to second guess a Union's bargaining 'tactics' with the benefit of hindsight. Nevertheless, the Board has also made clear

that the duty of fair representation imposed upon a Union by section 74 of the Act applies to all aspects of the Union's representational authority with respect to a bargaining unit, including the bargaining process. Therefore, and given the extensive representations which the Union has made concerning this group of allegations and why they should be dismissed without the need for a hearing, it is appropriate to provide the applicants with an opportunity to file submission in response, before considering the Unions preliminary request.

The Implementation of the Closure Agreement

42. The individual applicants allege that certain of them have not received payments they were entitled to under the Closure Agreement and that when employees in the bargain unit attempted to obtain the payments provided for they were required by the employer to sign a "Final Release and Indemnity" which was not contemplated by the terms of the Closure Agreement. The applicants also claim that, upon their termination, they were only provided with "reference letters" by Ready Bake instead of the "letters of reference" required by the Closure Agreement.

43. There is, however, no allegation that the Union has ever agreed with Ready Bake's position concerning the payments or was involved with the drawing-up, or insisted on the signing of the release. Further, there is no allegation that the Union ever instructed any one to sign the release. Finally, there is no allegation that the Union ever advised any employees in the bargaining unit that it would not seek to represent them in obtaining payments from Ready Bake.

44. It is equally clear that it was the employer, and not the Union, which provided the reference letters to the employees.

45. Notwithstanding the various positions which the Union has taken in response to the applicants' claims concerning the interpretation and enforcement of the Closure Agreement, it is now clear, as a result of the Board's decision in the Union's section 96 application (Board File No. 0566-06-U) that all such interpretation and enforcement issues can be dealt with at arbitration. Accordingly, if the applicants still wish to proceed, at this time, with this group of allegations against the Union, they are hereby directed to file further submissions, specifically addressing the issue of why these allegations are not now premature, and should only be considered, if need be, after the Union has, or has at least had the opportunity to, refer these various issues to arbitration, and in response to the Union's request that they should be dismissed without the need for a hearing in any event.

REMEDIES

46. In their respective responses to both of the applications filed by the individual employees, the Union and Ready Bake assert that the applicants have requested extensive remedies most, if not all, of which are beyond the Board's jurisdiction to grant. In particular they assert that the individual applicants appear to be seeking a series of "common law" remedies which are only applicable to actions for wrongful dismissals and which are entirely inappropriate in applications concerning violations of the Act and that therefore these applications should be dismissed on a preliminary basis. It is unnecessary to determine these requests at this time. As is clear from the various rulings set out above, these applications, and the issues to be dealt with, have now been narrowed and may yet be narrowed further. Therefore, in addition to providing

the further submission and/or particulars concerning the specific allegations which have not been dismissed, the individual applicants are directed to set out the specific remedies which they are seeking with respect to each of the alleged violations of the Act and why, in view of the submissions of the Union and Ready Bake, such remedies could be appropriate. Thereafter, the Union and Ready Bake will have the opportunity to respond if they so choose, prior to the Board making any determinations with respect to these preliminary requests concerning remedies.

PRIVILEGE

47. In their respective responses to the applications filed by the individual employees, both the Union and Ready Bake assert that the applicants have sought to file with the Board various pieces of correspondence between the parties which are privileged as they are marked "without prejudice". It is claimed that such documents are inadmissible and cannot be relied upon in evidence.

48. Given the various rulings provided herein it is unclear whether any of the disputed documents continue to be relevant. In any event it is unnecessary to deal with this issue at this time. All that the Board is currently dealing with are the parties' pleadings and pleadings are not evidence. No documents, whether filed with the Board or not, have been admitted into evidence. If and when these matters do proceed to hearing, it will be up to the panel hearing them to make all determinations concerning evidence including which documents can be admitted and relied upon.

SCHEDULE

49. The individual applicants have been ordered herein to file further particulars and submissions concerning certain of their allegations and the remedies being sought in both of their applications. These submissions are to be filed with the Board, and the other parties, on or before February 19th, 2007.

50. The Union and Ready Bake will have until March 12th, 2007, to file any response.

51. After all submissions and particulars are received, the Board will consider how these matters should proceed including considering whether, and/or concerning what remaining allegations, a hearing and/or consultation is required.

3735-05-R; 3736-05-R Labourers International Union of North America, Local 837, Applicant v. **ReNu Recycling Inc.**, Responding Party.

Certification – Construction Industry – Non-Construction Employer – The Labourers filed two applications for certification simultaneously (industrial and construction), seeking to represent the employees of ReNu engaged in the dismantling and removal of metal fixtures at a moribund steel manufacturing facility – The Board found that the predominant nature of the work the employees were performing was "demolition" and therefore construction – Secondly, the Board examined whether ReNu could qualify for

the non-construction employer exemption – The Board found that ReNu was not performing construction work for which it could expect compensation from a third party; rather, ReNu was salvaging the metal and reselling it as part of the salvage operations – Application for construction certification dismissed – Non-Construction employer status granted – Application for industrial certification referred to Manager of Field Services to count ballots

BEFORE: *Corinne F. Murray*, Vice-Chair.

APPEARANCES: *Ernest A. Schirru* and *Lee Crossan* for the applicant; *Gregory F. McGinnis* for the responding party.

DECISION OF THE BOARD; January 26, 2007

1. This decision deals with two issues arising within two applications for certification filed the same day and in relation to the same individuals working on the same worksite. One of the applications was filed under the construction provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). The worksite was a moribund steel making facility formerly operated by Atlas Steel prior to its bankruptcy. The two issues are whether the responding party ("ReNu") was engaged in a business within the "construction industry" and whether ReNu nevertheless is a "non-construction employer" pursuant to subsection 126(1) of the Act.

2. If it is determined that ReNu did not engage in construction work at all or performed none of its construction work with the expectation of compensation from an unrelated person, the application for certification in Board File No. 3735-05-R (the "construction application"), will be dismissed and the other application for certification filed pursuant to section 8 (the "industrial application") would proceed.

3. ReNu is a Michigan-based scrap dealer and vendor of metallurgical materials. Commencing in September of 2005 and continuing over a period of approximately six months, Central Salvage Ltd. ("Central Salvage"), entered into a number of contracts with ReNu to permit ReNu to remove identified items from the Atlas Steel facility in Welland, Ontario. Most of these were located within various buildings used in Atlas Steel's operations and many were bolted to the floor ground or attached to walls. This was the first work that ReNu had ever performed in Canada. It engaged a workforce for this purpose from two agencies, Labour Ready and National Rigging, however, the supervisory personnel came from its U.S. operations.

Summary of Positions

4. ReNu claims that its work in connection with the removal of machinery, equipment and other items from various buildings is not construction work because ReNu purchased those objects as chattels for resale to third parties. Thus the effort necessary to remove any of them, including those that were affixed to the buildings, structures or ground, was merely to obtain possession of chattels and was neither "constructing" or "demolishing buildings or structures" within the meaning of subsection 1(1) of the Act. The applicant argues that it is irrelevant whether ultimately ReNu had chattels for resale because the only relevant phase the Board should consider is when most of the objects were affixed to the building and/or ground.

5. ReNu argues that it is a "non-construction employer" because its activities were carried out for its own benefit and there was no "third party" from which it expected to receive or did receive compensation for such activity. The applicant says that ReNu cannot qualify as a "non-construction employer" because it expected compensation for its labour costs in connection with the removal or acquisition of the materials as a result of the difference between the price paid to Central Salvage under contract and the selling price of those materials to ReNu's customers.

The Facts

6. ReNu entered into a series of seven (7) contracts over a period of six months. In each it agreed to pay Central Salvage for existing "scrap" material, mills and other structures and/or contents of buildings that were once the constituent parts of Atlas Steel's vast facility. The buildings within which ReNu performed its work included the Forge Building, the Mill Complex, the South Plant, various Machine Shops within those buildings, the "Old Melt Shop", Central Stores and a Central Warehouse.

7. ReNu agreed to bear all costs of removal of the items purchased. The contracts stated that ReNu was responsible for completely "dismantling, removing, packing and loading" of the items, as well as transporting them off the site. In the first contract the price was prepaid by ReNu; but subsequent contracts were more closely tied to removal. Typically after an initial down payment, there were staged payments, the last one payable on a date when all the items had removed. Interim billings based on a tonnage rate were contemplated if ReNu took anything off-site prior to the final payment date. There was no evidence of any adjustments to the agreed price based upon any changes in ReNu's costs of removal.

8. Among ReNu's other obligations was a commitment to perform the removal work during specified hours of the week, responsibility for safety and fire protection, permits, notices, handling of hazardous materials, participation at meetings of Central Salvage regarding the work requirements and leaving the facility in a specified physical state after the removal work was finished, e.g. base bolts cut flush to the floor and floors graded and cleaned. The contracts identified the location of the material purchased (with exclusions) and required that ReNu assume all environmental responsibilities entailed in its dismantling and removal of the agreed material.

9. The exclusion of certain pieces of equipment and areas appears to have been an indication that a number of transactions or potential transactions between Central Salvage and other purchasers were contemplated or underway. In most of the contracts, Central Salvage warranted that the equipment sold was free of liens or any other claims whatsoever. Central Salvage's only obligation was the provision of overhead cranes in the particular building on a "best effort basis" but with no costs to be borne by Central Salvage.

10. Mike Lewis ("Lewis"), Director of Purchasing for ReNu, gave evidence about the negotiation of the contracts with Central Salvage and generally about the work ReNu undertook as a result from the beginning until the time of the applications. Maynard Blach ("Blach"), ReNu's senior manager on site in February of 2006 responsible for oversight of the work, gave a more detailed description of the work in progress then. Another ReNu employee, Bill Gerhart, Jr. was able to testify about the work going back to November of 2005. Although all were keen on explaining their work in a way that was most favourable to the items they were dealing with

being "chattels", not fixtures, all gave their testimony in a forthright manner. There ended up being little relevant difference between their testimony and that of the one witness called by the union to testify - Arnold Marks ("Marks"), a worker who started in mid-January and was under the supervision of Blach.

11. Lewis was involved in most of the negotiations with Central Salvage. He said that ReNu's primary intention in entering into the contracts was the purchase of "scrap for resale". ReNu was less interested in the ferrous materials because they were of much less value compared with that of the non-ferrous materials. Non-ferrous materials included copper and precious metals and ferrous materials included steel; each group had different markets. The materials purchased generally required sorting by ReNu's workforce according to their metal content.

12. Each time a potential contract came up with Central Salvage, Lewis and another estimator at ReNu made separate estimates of the weight of the metals involved. Usually their estimates were within 15% of each other and an average of the two would generally produce the final figure ReNu would use to make its proposal. Lewis testified that in a number, if not all, of the contracts he used the same "factor" of dollars per tonne to come up with a total amount ReNu would be willing to pay Central Salvage to secure possession of the material/equipment for resale.

13. Under cross-examination, Lewis disagreed with the suggestion that in making the "bids" or offers he "took into account" the amount of work that would be involved in dismantling the materials and reiterated that he always used the same "factor", a dollar amount. He claimed that this factor was easy to use and always was "on the high side". He acknowledged that this standard factor "assumed" the "costs of doing business", i.e., certain labour costs, the cost of equipment rentals and other administrative costs. He agreed that this assumption allowed enough room in the resale proceeds for profit after taking in the account of those costs.

14. Lewis expressed his view that ReNu did not receive any "compensation for the removal of scrap" because all ReNu did was wire Central Salvage money as per the contracts. This was a self-serving statement, obviously intended to deflect from there being any contemplation of the market price for the materials being the source from which ReNu's costs of removal and transportation could be recouped, in whole or in part. Lewis agreed in cross-examination that if the cost of labour, equipment etc. in a particular contract were less than his assumptions, there would be more profit.

15. Lewis characterized ReNu's work as "excavating". Where the contents of buildings identified under a contract were affixed or bolted to the floor or walls, ReNu would have to do all of the usual steps necessary to detach them, e.g. cutting bolts that were deeply embedded in cement floors or torching metal from the walls of the buildings. He agreed that most of what ReNu purchased did require some torching and dismantling. In some instances the items purchased entailed no dismantling at all, as was the case with the purchase of the contents of wooden scrap bins which were not affixed to the ground or the floor.

16. ReNu sold the ferrous material to local brokers and to various Canadian steel mills, such as Dofasco and HSB. The brokers were responsible for the transportation from the Atlas Steel site. The more valuable non-ferrous material was sent to ReNu's Michigan operations where ReNu employed 60 full-time staff specialized in handling non-ferrous scrap, including

doing the necessary lab level analysis to determine its composition prior to sale. Transportation was arranged by Blach.

17. Central Salvage's role with respect to the Atlas Steel facility is not entirely clear. Although ReNu's assumption in entering into each of the contracts was that acquisition of the chattels would entail significant removal activity, sometimes this work was avoided, or at least interrupted, by a resale to a third party. In those instances, the third party became responsible for removing the equipment, taking it apart, sorting and loading, as well as arranging the requisite insurance to cover all liabilities for these activities and to hold ReNu "harmless". Much of the Melt Shop and a small proportion of items from other areas were dealt with in this way.

18. In at least two instances, Central Salvage's actions caused the items "owned by" ReNu under contract to be sold to third parties. One involved a piece of a mill that was purchased "as is where is" by Crucible Steel for its reuse and another was the sale of some transformers sold to Niagara Hydro. Removal was done directly by each of these entities. In a later transaction, ReNu ended up repurchasing copper extracted from the transformers. Regardless of how these third party purchases came about before ReNu had fully removed all of the items from the site, it was Blach's job to weigh the trucks in and out to ensure proper payment to ReNu. There was no evidence that such payments included any compensation for construction costs incurred to remove them.

19. No demolition permits were obtained by ReNu because an engineering firm, retained by ReNu to advise upon this issue, said that none was needed because no "structures" were being taken down. The City of Welland also determined that no permit was necessary for the scrapping machinery and equipment. There was an engineer on site, not retained by ReNu, who was responsible for placement of concrete debris.

20. Lewis indicated that many of the items purchased by ReNu were attached either to the floor or walls by various means. In an effort to minimize the number of "affixed" items, Lewis initially ventured the opinion that a 12,000 lb. hammer embedded in the ground to a depth of 30-40 ft. could be lifted out if a sufficiently large forklift were available. In cross-examination he had to agree that such a forklift was not available at the time. Other items, such as floor plates were affixed to concrete that needed to be broken apart with a ball on a crane before being cut up into pieces for removal.

21. Blach's testimony provided more detail about ReNu's operations in and around when the applications were filed. Suffice it to say that ReNu needed large-scale equipment to remove much of what was purchased. In February of 2006 the location of most of the work being done by ReNu was the 26" Mill. Ferrous scrap, such as annealing covers and 14 foot rollers used in the Mill, were being cut up into a "shippable" size. There were different rollers for various parts of the Mill. Most were 4 feet in diameter. Since they were to be sold at different prices dependent upon their nickel content, after these materials were cut they were sorted into three piles relative to the percentage of their nickel content.

22. These rollers, and other materials to be cut, were generally moved from where they were situated to a designated cutting area by a 6ft. magnet attached to a crane, or with grapples in the areas where cranes could not be used. Blach explained that since the main part of this mill had been sold to Crucible Steel, the rollers that ReNu removed were "spare rollers" that were not

"affixed" to anything. Cutting was done with oxygen or propane torches. The pieces were then loaded onto a truck for removal.

23. Valuable stainless steel was pulled out of an annealing box and the rest cut up for local resale. After this box had been pushed out of a furnace by means of a conveyor, all of the welded spots on its cover needed torching aimed primarily at removing the stainless steel that was to be cut up into smaller pieces. Hundreds of 20 foot "billets" scattered "all over the place" required cutting and sorting, again according to the content of nickel. Generally Blach said that these billets were not affixed, mostly just lying on the ground.

24. Riggers from National Rigging worked in the motor room pulling out motors, ranging in weight from 5,000 to 125,000 lbs., using an overhead crane. Some motors were below ground level. For those motors that were "sitting on concrete" the riggers cut the bolts and the shaft to the gearbox prior to pulling them out using chains. Two or three days of cutting was necessary to remove the largest motors.

25. Once removed, the motors were moved to a shipping door to allow a grapple to put them in a pile, some as much as 10 feet high with a base of 20 feet. Ninety percent of the motors went whole onto the flatbed trucks for shipping, the other 10% being dismantled on site. All the motors were shipped as scrap to ReNu yards in the U.S. because of their copper content. Gearboxes, mostly ferrous material, were generally bolted to the ground and it could take up to a week to remove them. As with the motors, there was no attempt to separate the components of the gearboxes prior to shipping unless their size was too big for shipping without further reduction in size.

26. ReNu also purchased a considerable amount of wire that also needed to be removed, either by hand or by using a grapple. Between 1-2 inches in diameter, some wire ran underground, either on trays or over the ground. On occasion concrete surrounded the wire, calling for a grapple to break the concrete up. The wires located in the basement were generally in trays bolted to the building, requiring riggers to cut the bolts with torches prior to the Labour Ready workers pulling the wire out. All wire was cut into pieces and put into a box that a crane lifted to a loading area. Although the wires had various types of coatings, including lead, there was no attempt to extract the copper wire from its coatings prior to shipping to Michigan.

27. Blach testified that the dismantling of Central Stores did not entail ReNu taking anything that started out affixed to the ground. Goods and parts needed by Atlas Steels were stored on a number of racks, one rack holding gears and shafts, another holding aluminium parts, rope, safety glasses and other supplies, such as diesel engines and so on. Some items, like bearings, were sold to third parties in boxes.

28. Gerhart's testimony substantially confirms what Blach had indicated about the work involved in the removal of items from the 26" Mill and likened it to ReNu's work done at the South Building, commencing in November of 2005. The distinction in February was the election of ReNu to use an overhead crane. South Building and the 26" Mill each had a batch of stainless steel rollers to be cut, a Motor Room with motors that were bolted to the ground, billets scattered around to be similarly dealt with and wiring to be pulled down. He added that there were also 4x8 sheets of stainless steel panels "welded and bolted" to the wall that ReNu only partially

removed by torching. This material was found "by chance" in the Mill and did not comprise a lot of work.

29. Gerhart agreed that about a dozen or so motors (which he referred to as Motor Generator Sets) in the Motor Room were affixed to the floor. He added that after the motors were "picked clean" of coils and other parts that had more valuable metals like copper prior to being put in the ferrous pile. He agreed that even with this "cleaning" process the non-ferrous material in the motors was not completely separated from the mostly ferrous material of which the motors and gearboxes were made. The gearboxes were treated the same way, including the draining of oil from them. Some of the billets were in the floor or "buried" in the ground. They were dealt with in much the same way as the rollers, i.e., cutting them into appropriately sized pieces and ranking them for their nickel content.

30. The evidence offered by the union through Marks was largely confirmatory of that given by ReNu's witnesses, although he could elaborate more upon work that he had initially done in the 26" Mill of torching furnaces that were being removed. Marks started his work in mid-January of 2006 and after an initial period of three weeks torching the furnace parts, he was transferred to another part of the 26" Mill to work under Gerhart torching rollers that were laid out according to their nickel content.

31. Based upon seeing the rollers on the Mills affixed with bolts and their removal consequently requiring a crane with a hook, Marks concluded that the rollers he had worked upon had actually come from a Mill. At best his conclusion is speculative and certainly does not cause me to doubt the testimony of Blach or Gerhart that the rolls being cut in the 26" Mill in this interval of time were spares lying about. Marks observed floor plates over the pits in the floor but he was not involved in their removal, however, he was directly involved in cutting up 50 railway ties. He indicated that there was considerable sludge around many of the materials. He added that he believed that the riggers employed by National Rigging and involved in various work were "unionized".

Argument

32. ReNu's submits that it is a scrap dealer and the work is did was not within the "construction industry". It simply did whatever was necessary to gain possession of the chattels it had purchased for their "scrap value" and resale on the open market. While the majority of what it purchased was not "affixed" to the ground of the buildings, ReNu conceded that items that were, such as motors and cables, were "affixed more than slightly" and a "non-trivial" amount of work was necessary to remove them. The less work, the better because when materials were just lying on the ground or in boxes they could be readily sold with little the labour cost. Its activities were only what had been necessary to recover personal property for resale as scrap.

33. ReNu emphasizes that the contract with Central Salvage was for the purchase of personal property. Although it became necessary to rip some of these chattels out of the ground, this activity is very different than the type of work analyzed by the Board in *Arcan Eastern Ltd.*, [1969] OLRB Rep. April 141 and other situations considered by the Board in the past (*Disney Display*, [1986] OLRB Rep. Feb. 236, *Volcano Inc.*, [1988] OLRB Rep. January 97). The activities examined in these and other decisions of the Board all occurred in contexts that were

readily recognizable as construction activity, i.e., where workers were arguably putting on or affixing something to a structure or the ground.

34. The Board's decision in *Port Weller Dry Docks*, [1991] OLRB Rep. Sept. 1090 shows how important the context is to the assessment of whether work falls within the construction industry. The work may look like construction, and in another context ReNu's actions might be considered demolition, but it is not construction work if it is done in connection with chattels. The act of cutting loose an object pursuant to a contract of purchase of it as a chattel is essentially different from work whose object is its continuation as a fixture.

35. ReNu neither demolished nor altered nor improved upon the Atlas Steel's buildings and the arrangement between Central Salvage and ReNu was not for any "construction" purpose. It was the purchase of scrap material. ReNu, therefore, asserts that it has met its onus because the agreement was for the purchase of chattels and whatever activities related to the land, or items affixed to the buildings or land, was incidental to the removal of the chattels it had purchased. To conclude that its work is within the construction industry because the object originally was a fixture until the bolts removed would be hairsplitting and would require that the purpose of the contract between Central Salvage and ReNu be ignored.

36. ReNu argues that this is a case of "first impression". All of the other contexts of the previous decisions of the Board required a determination to be made as to whether the object was being affixed or not, i.e. was becoming or had become real property, (in accordance with principle established in *Arcan Eastern Ltd, supra*) or whether something affixed was being removed and replaced for the purpose of making improvement to the land (see *Abitibi-Price Inc.* [1986] OLRB Rep. December 1613).

37. ReNu's second argument, "independent" of its first, is that ReNu is a "non-construction employer" within the definition of sections 126 and 127.2 of the Act. The main reason is that "non-construction employers" are not paid nor do they expect to be paid "compensation" from an unrelated third party for their work.

38. Thus Hudson's Bay was found not to be a "non-construction employer" because it was unsuccessful in showing that its work of creating boutiques in its stores was not paid for by its tenants who were going to operate them. (See *Hudson's Bay Co.*, [2002] OLRB Rep. May/June 398 (May 28, 2002).

39. The compensation arrangements with respect to the creation of "gas bars" that lead the Board to find that Shell Canada Products was a "non-construction employer" in *Shell Canada Products, A General Partnership of Shell Canada Limited and Shell Canada O.P. Inc.*, [2002] OLRB Rep. July/August 729 (August 20, 2002) are the same as were operative in ReNu's situation at Atlas Steel. Neither Shell Canada Products nor ReNu received compensation from anyone for their work. ReNu was neither paid by Central Salvage for its operations nor was there any other entity from which it expected payment for all or some of the labour costs of retrieving and removing the chattels it had purchased. All that ReNu received, or expected to receive, was revenue from the sale of those materials. There is no evidence that Central Salvage wanted the materials removed to enable it or Atlas Steel to use the buildings for any purpose. There also was no evidence that the contract with Central Salvage was "building in" any labour costs.

40. In ReNu's analysis, the most important economic fact that makes it a non-construction employer is the fact that the purchase price paid by ReNu was determined by the open market and had nothing to do with the cost of removal. In this respect the Board's decision in *Windsor-Essex Catholic District School Board*, [2002] OLRB Rep Oct. 971 (October 17, 2002) provides guidance because in that case the Board highlighted the need for an exchange of money from a third party specifically for the work performed. There was no such exchange between ReNu and Central Salvage. The objects were sold to ReNu, which had to go through a process of removal in order to sell them to customers in the markets who had not idea how they came to be on these markets nor the costs incurred to get them there.

41. The union asserts that the work done was "dismantling" and "demolition" and that this activity clearly brings ReNu's activities within the construction industry. The majority of the materials were affixed to the ground or the buildings. The necessary initial step was consistently to "unaffix" what was being removed: it was only "ancillary" work to cut them into pieces. Gerhardt, confirmed by Marks, described the work involved as "demolishing" everything in the building.

42. The union argues that the resemblance between ReNu's activities and those normally needed in demolition work is a key fact for the Board to consider. The accumulated sludge was akin to cement in its effect on the object lodged in it. Bolts had to be removed through the use of hydraulics prior to a number of these items being further dealt with. Pick axes, bobcats, chains and cranes were all necessary for removal and a grappler was needed to smash the cement. In the union's submission the only logical conclusion from all of this is that ReNu was mainly engaged in construction work – "if it looks like a duck, it is a duck".

43. In response to ReNu's assertion that the arrangement was the "purchase and sale of chattels", the union argues that the material only became chattels after work to "unaffix" them, i.e. once the construction work is done. The analysis of what constitutes a chattel in paragraph 75 of *E.S. Fox*, [1993] OLRB Rep. April 321, is the Board's guide:

> "The barge is a chattel. It is not affixed to the land and is not part of the land. It is both easily removed from its location and generally moveable. It is personal property. The work performed by E.S. Fox's employees upon that personal (as opposed to real) property, or upon that chattel, is not work performed by employees in the ICI sector of the construction industry".

44. The union agrees that the context of the work is important to the assessment of whether these materials were "chattels". Significant for the union's argument with respect to context is that the Mills were "structures" within the buildings and their removal meets the historical description of demolition as articulated in the ministerial designations of the employee bargaining agency. The Board's decision in *Arcan Eastern Ltd., supra*, established that the object need only be affixed "slightly" to bring work into the realm of construction since this state made it a "fixture", i.e. part of a building. The union reiterated that both the ferrous and non-ferrous materials removed by ReNu were more than slightly affixed through a number of means, including sludge that was equivalent to cement.

45. The union also emphasized the principles set out in paragraph 16 of the Board's decision in *City of Toronto*, [1978] OLRB Rep. December 1145 (echoing *Arcan Eastern Ltd., supra*,) and in paragraphs 29 and 31 of *Abitibi-Price Inc., supra*, that found piping and other

equipment that were used in the water system of the papermaking Mill were affixed to the building as well. In this respect, the union highlighted that the "rigging people" from National Rigging were certified under the construction industry provisions of the Act.

46. With respect to the second argument of ReNu, the union emphasized that Lewis's evidence affirmed that "labour was part of the sale price". His purchase price using his "factor", contemplated a sale price of which included a certain amount for labour costs (i.e. demolition and putting the result into saleable pieces) and another amount for profit. The sale price thus generated profits as a result of the demolition work that was also reimbursed through those proceeds.

47. Although the union had to concede that there was no direct payment from a third party, it suggests that there are many ways in which a "profit can be structured". Money was clearly "made" on the labour expended. From this perspective the union argues that ReNu's argument has to fail on the facts. In order for an entity to qualify as a "non-construction" employer, there cannot be *any* expected revenue from the construction activity. It would be an entirely different situation if ReNu was salvaging the materials for use in its own operations. The compensation that ReNu received was in the form of a cheaper purchase price that recognized that work necessary to remove the materials for sale.

48. In response ReNu asserts that it is irrelevant whether an item can only be moved with a crane or other large equipment: it is still a chattel. It is also irrelevant whether the riggers of National Rigging were operating under a certificate within the construction industry. It is entirely relevant and legitimate for the Board consider the purpose of ReNu's activities at Atlas Steel in making its determination of whether ReNu is in the construction business just as it takes this into account when determining whether work falls within repair/maintenance or construction.

49. As for the union's arguments relating to the issue of ReNu being a "non-construction" employer, ReNu argue that it is a mischaracterization of its position to say that it is claiming that there was no profit from removal work. ReNu's assertion is that it did not receive any "compensation" from the specific act of removal. The *Shell Canada Products* decision, *supra*, makes it clear that the construction activity must be paid for. Regardless of what ReNu's costs were, ReNu was compensated according to the market price prevailing and was paid by Central Salvage according to the established purchase price.

50. That said, it is ridiculous to claim that Dofasco or purchasers in China are paying for ReNu's cost of removal of the materials purchased or that ReNu could expect them to do that at the time it was performing the work. The Act plainly requires consideration to pass between the entity who received the benefit of the work and the entity performing the construction work. A non-specific payment is not "compensation" within the meaning of subsection 126(1) of the Act. There was absolutely no payment for construction costs by the purchasers of the materials because the price they paid is driven by the market and was not according to the cost of getting them there.

51. The union's argument disputing the relevance of the materials being for ReNu's own use is fallacious. It makes no difference to a determination of the meaning of "compensation" in subsection 126(1) whether ReNu used the material for its own operations to make and sell some other product or not. The question is whether there is a payment made for the costs of removal

from Atlas Steels' premises. It is not a question of abstract economic theory. Since there is no compensation for these costs, ReNu's work comes within the definition.

Decision

52. The first question to be addressed is whether ReNu's activity falls within the definition of "construction industry" in subsection 1(1) of the Act. Even if the answer is that it does, the second question must be addressed because ReNu could nevertheless be a "non-construction employer" under subsection 126(1) of the Act if it expected compensation for that work from an unrelated person.

53. These definitions are reproduced below for ease of reference:

> **1.** (1) In this Act,
>
> ....
>
> "construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site;
>
> ...
>
> **126.** (1) In this section and in sections 126.1 to 168,
>
> ...
>
> "employer" means a person other than a non-construction employer who operates a business in the construction industry, and for purposes of an application for accreditation means an employer other than a non-construction employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof;
>
> ...
>
> "non-construction employer" means an employer who does no work in the construction industry for which the employer expects compensation from an unrelated person.
>
> "sector" means a division of the construction industry as determined by work characteristics and includes the industrial, commercial and institutional sector, the residential sector, the sewers and watermains sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector;

54. The first question is whether ReNu's activity constituted "demolishing buildings and structures" within the meaning of that terminology used in the definition of "construction industry".

55. There is little doubt that ReNu's work was in a large part demolition and dismantling of huge pieces of equipment, such as furnaces and motors, that were affixed more than slightly to

the ground. A decision on the exact proportionality between "fixtures" and materials that were not affixed to the ground or buildings is not necessary. Appropriately, the parties did not attempt to reconstruct the activities on the date of application for the purposes of determining this question. Even if there may have been more "loose" material than those affixed, a major part of the work and cost was generated by the removal of affixed materials. Whether the materials were affixed by concrete, bolts or sludge, whether sitting in pans that were so affixed or lying on the ground, I am convinced that the predominant nature of the work was "demolition" of parts of the buildings and structures at Atlas Steel's moribund facility.

56. In *Arcan Eastern Ltd., supra*, the Board carefully made a differentiation between what it had determined and the question left open, i.e. if the Board had not determined that the disputed shelves were affixed whether that work would necessarily have fallen outside the "construction industry" definition. This logic shows that the question of whether the rollers lying on the ground were affixed or not is not necessarily important in this context. Even if a great number were "spares" and never "affixed" to a steel mill, there were others that were and since both ultimately required much the same work to enable their transportation for resale, this should be considered part and parcel of the demolition of an existing facility with huge structures, generally affixed to ground, and walls with wiring.

57. ReNu's arguments that the Board should put aside the resemblance its work may have to activities normally associated with demolition and instead consider the purpose and context of ReNu's activity are not persuasive for the following reasons. The immediate result of ReNu's work was the demolition of affixed structures and parts of buildings at the Atlas Steel facility. There is thus no room for an analysis of purpose similar to what occurs when the question is whether the work is for repair/maintenance or construction. The action of ripping out a fixture that is thus transformed into a chattel always occurs in the course of demolition, although usually the resultant chattels are of far less value than those ReNu purchased.

58. The context only reinforces this conclusion – Atlas Steel was bankrupt and its moribund facility was being de-constructed or broken apart under the control of Central Salvage. To describe that context as the "removal of chattels" simply states the obvious – that all demolition work entails to some degree the transformation of a fixture or parts of a building into chattels. I therefore find that the work performed by ReNu is within the scope of the definition of the "construction industry". In reaching this conclusion it is absolutely irrelevant whether the riggers supplied by National Rigging were covered by a collective agreement negotiated within the industrial, commercial or institutional sector of the construction industry.

59. Having made this determination, the question becomes whether ReNu's economic reward for its activity under contract with Central Salvage is "compensation" within the meaning of subsection 126(1) of the Act, specifically whether ReNu's purchase price from Central Salvage and/or the sale price to customers of ReNu can be considered "compensation" to ReNu for its costs of extraction. There is no dispute that neither Central Salvage nor the purchasers of these materials are related to ReNu in any way.

60. In *Hudson's Bay Co. supra*, the Board's first decision applying this newly introduced definition of "compensation", described at paragraph 52 what sorts of concepts would come within it:

> "Compensation" is a large vessel which accommodates a range of concepts including reimbursement, payment, profit, recompense (in money or in kind) and reparation. In our view, compensation is sufficiently expansive to include the circumstances described in this case. Where HBC (*the responding party, Hudson's Bay Company*) engages contractors to perform work for the benefit of licensees and manufacturers (*who occupy parts of HBC's leased retails premises*) and HBC expects to be reimbursed by the licensee or manufacturer, that reimbursement is "compensation".
> (*Italicized portions in parenthesis added*)

61. In that case HBC was found to have "charged back" to licensees of space on its premises the costs of finishing work (including "fixturing" and "decorating") performed on that space and thus was found to have undertaken such work in the expectation of "compensation" within the meaning of this subsection. It is as important to note that the Board rejected the union's proposition that the costs of construction work could be considered to have been included in HBC's calculation of or setting of the licensing fee because HBC had specifically led evidence that these costs of construction had not been included in calculating the licensing fee.

62. This decision, together with others, show that the actual fiscal arrangements are more important than abstract economic theory or assumptions. Thus the entity performing the construction work must expect, as a result of a specific arrangement that the unrelated third party will provide payment, regardless of form, that is specifically attributable to that construction. This interpretation is consistent with the aim of this definition, which is the exclusion from the realm of construction industry collective bargaining of entities that do not perform construction work with the same economic considerations as employers operating construction businesses.

63. Thus the Board found in *Shell Canada Products, supra*, that Shell was a "non-construction employer" because no part of the payments made to Shell by its various dealers who operated gas bars, convenience stores and car washes under lease from Shell could be attributed to the construction costs that Shell expended or would expend with respect to those leased premises. The Board's analysis at paragraph 43 states that:

> This is not simply an accounting matter. The definition of "non-construction employer" requires that an applicant demonstrate that it does "no work in the construction industry *for which* the employer expects compensation from an unrelated person". The italicized works must mean, a grammatical sense, that it is the construction work for which the third party is paying."

64. There must be an identifiable and expected "exchange" between the party who is providing the "compensation" and the entity which performs construction work that is tied to that work. (see *Windsor-Essex Catholic District School Board, supra*) Therefore, the payment of a purchase price by customers participating in the various metals markets cannot be considered to be "compensation" for ReNu's extraction costs within subsection 126(1) of the Act because neither that price, nor any portion of it, is tied to ReNu's costs of extracting these materials. ReNu's payment to Central Salvage is to acquire the right to remove the metals and obtain title to them. The removal costs were incurred on its own behalf as a scrap dealer who will sell the metals recovered. ReNu is not a demolition contractor, i.e., doing the work to receive payment for the work alone. It is a metals vendor that has incurred various costs, the costs for the demolition being only being one of them, necessary to offer the scrap metal for sale.

65. There is also no connection established in the evidence between ReNu and Central Salvage as the purported payer for the demolition work. The union's argument that Central Salvage's sale price included "compensation" to ReNu for its labour costs necessary for removal does not satisfy the requirement that there be some sort of payment, in kind or money. It is similar to the unsuccessful argument in *Hudson's Bay Co, supra*, because there is no evidence with respect to what Central Salvage's calculations were in accepting a certain purchase price from ReNu. There is therefore no way to associate any aspect of Central Salvage's calculation with the reimbursement for the costs of the work performed by ReNu, specifically there was no evidence that Central Salvage's acceptance of ReNu's price was the result of any calculation whatsoever of the value of ReNu's work of extraction.

66. The only evidence was what assumptions ReNu made about a profit margin it might achieve overall from the various sales of materials in different markets. ReNu under contract, and in reality, bore the costs of removing the items identified. This was more akin to an investment or a licensing fee because it made the expenditures and entirely bore the risk of not being able to recoup them. ReNu's calculations assumed a certain return on its investment that was potentially unachievable either because the costs of extraction were more than expected and/or changes in market prices.

67. Though the interpretation of the definition of "compensation" ought to be expansive, as exemplified the Board's conceptual description in *Hudson's Bay Co, supra*, various decisions of the Board referred to above set boundaries that ensure that it did not stretch into economic theories or contractual assumptions. Thus the mere contemplation by ReNu that it could resell material extracted at an overall profit, after labour and other costs were accounted for, does not qualify as an expectation of "compensation". The essential compensatory linkage or attachment to the construction work is missing in both Central Salvage's agreement to accept ReNu's price of extraction and the market prices paid. Neither were paying for ReNu's construction work.

68. In the absence of such linkage or exchange, the contractual arrangements whereby Central Salvage laid down expectations for ReNu "dismantling" and removing contents of buildings are simply statements of the conditions under which the materials existed and of limitations upon Central Salvage's obligations to facilitate ReNu's gaining possession of the materials and equipment it had purchased. In this sense, ReNu's payments were shown to be no more than an "opportunity price".

69. Based upon these findings, the construction application is dismissed

70. The above determination makes agreements with respect to the inclusion of Christopher McDermont (#2) and David Hines (#12) on the employee list for the purposes of the construction application moot; however, the parties' agreement that both of these individuals should be included as employees in the industrial application will be operative for the remaining considerations in that application. Further the applicant also noted at the hearing its acceptance of the exclusion of Wayne Little (#15), Jim Funk (#16) and Mark Cutler (#17) from the list in the industrial application. In light of these representations, together with Minutes of Settlement that were made on May 1, 2006 indicating that ReNu has withdrawn its denial of being the employer of the "individuals in dispute" in each of the applications, no "status issues" remain unresolved for the purpose of the industrial application.

71. Therefore, it would appear that the employee list in the industrial application has been settled. Although final determination with respect to the appropriate bargaining unit description has not been made, it appears that the number and identity of those on the employees' list is unaffected by the dispute between the applicant's geographic scope (Province of Ontario) and the responding party's contention that the applicant's bargaining rights should be limited to those employees of ReNu Recycling Inc. "at 1, Centre Street, Welland, Ontario". The ballot box has remained sealed pending the determination of the issues that are the subject of this decision. The application pursuant to section 96 of the Act (Board File No. 3922-05-U), filed after the representation vote was held, does not raise any issue or seek any remedy with respect to the reliability of the results of such vote. Therefore, there appears to be no reason not to count the ballots cast by those whose names are on the employee list.

72. The industrial application is, therefore, directed to the Manager, Field Operations for the purposes of counting the ballots cast in the representation vote held on February 20, 2006. If the result of this count shows support for the applicant that warrants certification under subsection 10 of the Act but the parties are unable to agree upon a bargaining unit description, the parties are directed to make written submissions on the appropriateness of their respective bargaining unit descriptions by not later than 7 calendar days following the results of the vote being known.

2745-06-HS; 2746-06-HS Skyjack Inc. c/o Linamar Corporation, Applicant v. Sue Hutchinson, Inspector, Responding Party.

Health and Safety – The employer sought suspension of an order requiring it to develop and implement a written violence prevention program – The employer asserted that contrary to the inspector's order, it already had both anti-violence and anti-harassment policies and that the policies were part of the employer's orientation program – Further, the employer claimed there had never been any incidents of actual violence in the workplace – The Ministry argued the order was issued in response to specific threats of violence directed at one employee – The Board found that the inspector had ignored the existence of the employer's policies and the order failed to acknowledge the employer's efforts in dealing with the perceived threats – Since the employer successfully argued all three elements of the test for a suspension, the Board held that there were no grounds on which to defer to the inspector – Suspension granted

BEFORE: *Mark J. Lewis*, Vice-Chair.

DECISION OF THE BOARD: January 5, 2007

1. Board File No. 2746-06-HS is an application under section 61(7) of the *Occupational Health and Safety Act, R.S.O. 1990*, c. O.1, as amended (the "Act"), filed by Skyjack Inc. c/o Linamar Corporation seeking the suspension of an order issued by Inspector Sue Hutchinson, on November 3rd, 2006, in Field Visit No. 5326487 (the "Order"). Board File No. 2745-06-HS is the main appeal of the Order itself under section 61(1) of the Act. This decision deals only with the suspension request.

2. The Ministry of Labour (the "Ministry"), in its response in OLRB File No. 2746-06-HS, filed on December 18th, 2006, opposes the applicant's request for the suspension of the Order.

3. No issue has been taken with the timeliness of either the appeal or the suspension request.

The Order and the Position of the Applicant

4. The Order states the following:

> Pursuant to section 25(2)(h) of the Occupational Health and Safety Act, R.S.O. 1990, the employer shall, (h) take every precaution reasonable in the circumstances for the protection of a worker. The Employer shall conduct a risk assessment and develop and implement a written violence prevention program with measures and procedures to protect workers from violence in the workplace.

5. The Order sets a comply by date of November 30th, 2006.

6. The applicant takes the position in its appeal that it has at all material times been in compliance with section 25(2)(h) of the Act and that therefore the Order should be rescinded and that it should be suspended pending the determination of the appeal.

Background

7. At its facility which is the subject of the Order, located at 55 Campbell Road in Guelph, Ontario, the applicant manufactures aerial work platforms. The applicant has been engaged in this business since at least 1986. The applicant currently employs approximately 655 employees at this facility.

8. Notwithstanding what is set out in the Order, the applicant claims that it already has a written Violence in the Workplace Policy and a written Workplace Anti-Harassment Policy which deals with, amongst other things, physical abuse. Copies of these two policies were filed by the applicant as part of this suspension request.

9. The applicant does not state the date when its two policies were established (and there would appear to be nothing set out in the policies themselves which provides an effective date) but it is acknowledged by the Ministry in its response that both policies were in existence on November 3rd, 2006, when the Order was issued.

10. Further, the applicant asserts that its employees at the Guelph facility were, prior to November 3rd, 2006, and continuing thereafter, receiving instruction on these policies as part of the applicant's orientation programme. This is not disputed by the Ministry.

11. Finally, the applicant claims that there has never been even a single incident of actual violence in the workplace at its Guelph facility.

12. The Ministry does not dispute the applicant's claim that there has never been an incident of actual violence at the Guelph facility. It does, however, claim that an employee at this facility has had an ongoing concern with respect to his safety in the workplace based on perceived threats of violence from his co-workers. The Ministry claims that it first became aware of this worker's concerns on July 27th, 2006, and that it contacted the applicant about this situation at that time. Thereafter, on September 7th, 2006, Inspector Hutchinson conducted a field visit of the facility. No order was issued at that time and the Ministry acknowledges that, following this field visit, it considered the matter to be resolved.

13. Despite the September 7th visit, and a follow up visit of September 14th, this worker apparently continued to make telephone complaints to the Ministry concerning alleged threats to his physical safety. Specifically, the Ministry claims that this worker made such complaints on September 13th, September 15th, October 19th and October 30th. The Ministry's response to these complaints was a further field visit on November 3rd, 2006, and the Order was issued at that time.

14. The applicant does not deny that a worker has, since July 2006, been making complaints to the Ministry concerning a perceived threat of violence in the workplace. It claims that it has properly and completely investigated and dealt with the complaints of this worker. In fact the applicant claims that on September 19th, 2006, this worker agreed (in a signed statement which is not apparently disputed by the Ministry) that the complaints which he had made to the Ministry had been properly investigated by the applicant and had been appropriately resolved.

The Law

15. The law which is applicable to this request is clear. In assessing of suspension requests the Board has consistently applied three criteria:

> a. Whether the suspension of the order would endanger worker safety;
>
> b. The relative prejudice accruing to the parties from the suspension or lack of the suspension of the order;
>
> c. Whether the applicant has made out a strong *prima facie* case for the appeal of the order.

See *R. J. Dungey and Sons Ltd.*, [1999] OLRB Rep. Jan./Feb. 82.

16. In addition to the three criteria set out above certain Board decisions have set out a forth, independent, criterion which may be considered:

> d. Whether the circumstances warrant deference to the inspector's order.

See *National Steel Car*, OLRB File No. 3642-03-HS, March 12, 2004.

17. The applicant takes the position that when each of the three, or four, criteria regularly utilized by the Board are applied to the facts of this case then the only logical and appropriate result is that the Order should be suspended. The Ministry obviously disagrees with the applicant's position.

Would Worker Safety Be Endangered by Suspending the Order?

18. There is no question that violent incidents can occur in any workplace and the potential for such violence must be seriously addressed. The applicant claims that it is to this end that it established both its Violence in the Workplace and Workplace Anti-Harassment policies. The applicant further claims that all of its employees are aware of these policies and that it is actively enforcing them as demonstrated by the fact that there have been no incidents of actual violence in this workplace and that any complaints concerning the threat of violence have been properly investigated and dealt with.

19. While it does not allege that there have in fact been any instances of actual violence in this workplace, the Ministry take the position that, given the perception of a worker that the threat of violence is ongoing, this Order is required to protect workers and that its inspectors are not required to wait for an actual incident to occur before they act. Based on this, the Ministry claims that worker safety would be endangered if the Order were suspended.

20. The basic position of the Ministry is, in theory, completely sound and correct. Its inspectors are obviously entitled to be pro-active in ensuring that workers are safe, part of which obviously includes ensuring that appropriate safety policies and procedures are developed and implemented. However, in these specific circumstances this general position of the Ministry does not address the fundamental issue raised by the applicant in its suspension request, namely the dichotomy between the factual situation which apparently gave rise to this Order and the Order itself.

21. One worker has made a series of complaints concerning perceived threats of violence in this workplace. Under the provisions of the Act, and otherwise, such complaints must be seriously investigated and dealt with. There is, however, nothing in the Order itself, or elsewhere on the Premise/Project Form of November 3rd, or in any of the other documents relied upon by the Ministry in its response, which specifically links this Order to the complaints raised by the worker.

22. The Order states that the applicant has violated section 25(2)(h) of the Act by not taking every precaution reasonable in the circumstances for the protection of a worker. However, as the Order goes on to make clear, the applicant's alleged violation of this section of the Act relates to Inspector Hutchinson's position that this employer did not have in place a written violence prevention programme with measures and procedures to protect workers from violence in the workplace. Nowhere in the Order (or anywhere else in the report) is it alleged that the applicant in any way violated the Act with respect to how it dealt with any specific complaint brought forward by any worker. In fact, it would appear from the Premise/Project Forms related to the initial field visit of September 7th and the follow-up visit of September 14th that Inspector Hutchinson was completely satisfied with the actions that the applicant had taken concerning the worker's complaints.

23. Further, it would appear, based on his written statement, that the worker himself was satisfied with the applicant's response to all of the complaints which he had made prior to September 19th. While it is true that the Ministry also relies on two later complaints of October 19th and 30th to justify the Order, neither of these complaints or the manner in which they may have been dealt with by the applicant is referred to in the Order. In fact it is unclear if the

applicant was even made aware of these two complaints prior to the Ministry filing its response to this request..

24. The narrative portion of the November 3rd report makes absolutely no reference to any specific complaints but rather relies on the general position that written policies concerning violence in the workplace should exist, and that this employer does not have such a policy, as providing the basis for the Order. In this respect, Inspector Hutchinson states the following:

> The Ministry of Labour is currently addressing a Provincial Workplace Violence Prevention initiative. The Ministry of Labour defines workplace violence as, the attempted or actual exercise, by a person, of any intentional physical force that causes or may cause injury to a worker, and includes any threats which give a worker reasonable cause to believe he or she is at risk of physical injury. This Employer does not currently have a Violence Policy Program in place and as such an order is therefore issued to the Employer to conduct a risk assessment and develop and implement a written violence prevention program with measures and procedures to protect workers from violence in the workplace.
>
> [emphasis added]

25. There is no reference made by Inspector Hutchinson to the applicant's two policies which specifically deal with violence in the workplace and/or why they are so deficient so as not to constitute a "violence policy programme".

26. This facility has been operating for approximately 20 years without any claim that any incidents of actual violence have occurred. There are existing written policies in place which deal with violence in the workplace. To the extent there have been any problems at this facility, they have involved the perceived threat of violence by a single individual. With respect to the concerns raised by this individual prior to October 2006, all parties, including the Inspector and the worker who complained, appear to have agreed that they had been properly dealt with by the applicant and resolved. There is no basis on which to assume that any future complaints or concerns which may arise prior to the appeal being dealt with on its merits could not, and would not, be appropriately dealt with under the programmes currently in place. This conclusion is further reinforced by the fact that the Order very clearly does not relate to any specific situation in this workplace which must be addressed immediately but rather requires the applicant to engage in a general process of evaluation and programme design which, although it was to commence prior to November 30th, 2006, the Inspector did not require the applicant to complete and implement by any specific date.

27. Based on all of the above it is then reasonable to conclude that worker safety would not be placed in jeopardy if this Order were to be suspended pending the appeal

PREJUDICE

28. The applicant claims that it would be prejudiced if it were required to immediately comply with this Order as developing and implementing a new, and more detailed, violence in the workplace programme would involve considerable resources and costs.

29. The Ministry takes the position that the applicant has failed to provide any evidence of the costs of complying with the Order and therefore any suggestion of economic prejudice is purely speculative.

30. Any decision evaluating possible prejudice obviously requires a degree of speculation. It is true that the applicant has not provided any specific information concerning the resources which it would need to use and the added costs that it will bear if it is required to comply with this Order. However, this Order would appear to contemplate the applicant engaging in a not inconsiderable process involving a complete risk analysis of its entire workplace followed by the creation and implementation of a new programme for a facility at which over 600 persons are employed. Given this, it can be assumed that resources and costs would be required to comply and, although their exact amount may be unknown, they will not be nominal. What is also clear is that, whatever the costs are, the applicant will not be able to recoup them should its appeal be successful. Therefore, the applicant will suffer prejudice should the suspension not be granted.

31. Conversely there would appear to be very little prejudice if the Order is suspended. Under the terms of the Order the policies and procedures (including certain interim measures) established by the applicant are apparently to remain in place until such time as the new programme has been developed and can be implemented. The Order does not provide for any immediate change to workplace practices and therefore suspending it pending the appeal would have no immediate effect in the workplace.

PRIMA FACIE CASE

32. As the applicant asserts, underlying this Order is Inspector Hutchinson's finding that this employer did not have a violence policy programme in place at the time of her Order. However, despite the Inspector's failure to in any way refer to them, it is clear that this applicant did in fact have two written policies concerning violence in the workplace at the time and had taken steps to ensure that these policies were complied with. In response the Ministry asserts that Inspector Hutchinson's failure to refer to the written policies of the applicant, which it acknowledges she was aware of, establishes that she must have determined that these existing policies were so clearly deficient that they could not constitute a written violence prevention programme required if this employer was to be in compliance with the Act.

33. Section 25(2)(h) of the Act does not itself mandate an employer to take any particular precautions. Rather it requires an assessment of what precautions are reasonable in the specific circumstances of the particular workplace involved. Similarly, none of the "Elements of a Violence Prevention Program" listed in the narrative portion of the November 3rd report would appear to be mandatory. Again, the specific elements to be included within any programme will vary depending on the specific circumstances of a workplace. The report does not set out any specific precautions or programme elements which Inspector Hutchinson concluded are "required" by the specific circumstances of this workplace and/or why. Therefore the only basis upon which to conclude that the existing policies are deficient, and that the Act has been violated, is by deferring to the unexplained statement of the Inspector that there is no programme.

34. It is possible that when this matter is dealt with on the merits the evidence will establish that the existing policies are deficient and that as such the applicant is in violation of the Act. However, in view of the wording of the relevant section of the Act, which requires an

assessment of the particular circumstances of this workplace, a twenty year history which does not establish any consistent problems with violence in the workplace, and the fact that as late a September 14th, 2006, this Inspector did not apparently view the applicant's response to complaints concerning perceived threats of violence as being in any way inappropriate, the applicant would appear to have a reasonably strong *prima facie* case for its appeal.

35. Alternatively, the Ministry argues that the applicant has acknowledged that it was in violation of the Act as it filed a compliance plan as required by the Order. However, as plead by the applicant, the requirement to file such a plan was set out in the Order which further specified that the plan had to be filed prior to the expiry of the time limits for the filing of an appeal. Unless and until they are suspended or overturned (or varied) on appeal parties are legally required to abide by orders. It is for this reason that requests to suspend orders pending appeals are made. Accordingly, the mere fact that an applicant has attempted to comply with an order pending the determination of an appeal cannot be used against it in assessing the strength of its *prima facie* case.

DEFERENCE

36. The Board will often consider whether it is appropriate to defer to the decision of an inspector in determining whether or not to grant a suspension. Generally the Board has found that absent a persuasive reason to interfere with an inspector's order pending a full hearing of the appeal, an order should not be suspended, because orders that are reasonably and properly made should not be lightly overturned pending appeal.

37. In this case, however, the Board cannot find that the Order was reasonably and properly made.

38. As noted above this Order, requiring a risk analysis to be followed by the development and implementation of a written violence prevention programme, was premised on Inspector Hutchinson's finding that the applicant did not have a violence policy programme. It is, however, quite clear that this applicant already had two pre-existing written policies dealing directly with violence in the workplace. Neither of these policies, nor the steps which the applicant had taken to implement them through its employee training and orientation programmes, are referred to by Inspector Hutchinson in her November 3rd report. Even if it is assumed that she concluded that the pre-existing policies were deficient, as the Ministry urges, then the obvious and reasonable response would have been to clearly state this, along with noting at least some of the elements which she felt should be included, rather than simply stating that there was no programme at all. The failure to even mention these pre-existing measures in finding that there was no programme is even more surprising in view of the fact that Inspector Hutchinson had visited this workplace on two occasions in September to deal with a complaint concerning perceived threats of violence raised by a particular worker and was, at the time, apparently satisfied with the manner in which the complaint had been dealt with under the applicant's pre-existing policies and practices.

39. In these circumstances it is not appropriate to extend deference to the Order of the Inspector.

DECISION

40. All of the relevant criteria favour granting the suspension request. Accordingly the Board declares that the Order issued by Inspector Hutchinson in Field Visit No. 5326487 is suspended forthwith.

41. The Board however wishes to reiterate that worker health and safety is a critically important issue and that policies, programmes and procedures which deal with and prevent violence in the workplace are integral to the protection of worker health and safety. This decision in no way lessens the obligations of all persons, including the applicant, to take violence in the workplace seriously and to effectively deal with the potential for it occurring on a pro-active basis.

42. The applicant's suspension request is granted effective immediately. The main appeal is referred to the Registrar.

43. This panel is not seized of the main appeal.

0625-06-M; 0724-06-M The Corporation of the City of Cornwall, Applicant v. Canadian Union of Public Employees, Local 3251 PARA, Responding Party.

Ambulance Services Collective Bargaining Act, 2001 **– Reference – The City of Cornwall sought a Board-ordered Essential Services Agreement (ESA) for its ambulance drivers – Shortly thereafter, the Minister of Labour asked the Board whether he had the authority to issue a "no board" report – The Union opposed the City's application to the Board on the basis that (a) the parties had agreed to settle all future collective agreements by interest arbitration if necessary; and (b) the parties had already agreed to an ESA for the current round of bargaining – The Board found that there had been no agreement to "perpetual" interest arbitration due to: (1) the lack of "clearest possible language" indicating such in the memorandum of agreement; (2) the failure of the parties' bargaining history to demonstrate the offer and acceptance of the alleged terms; (3) and the conduct of the parties that belied the existence of such an agreement – The Board found that the ESA was not agreed to by the employer as the union did not present the final ESA to the City for approval after incorporating the terms requested by the City – The City's application was allowed to proceed – The Minister was advised that he had the authority to issue a "no board" report**

BEFORE: *Brian McLean*, Vice-Chair.

DECISION OF THE BOARD: January 10, 2007

1. Board File No. 0625-06-M is an application under the *Ambulance Services Collective Bargaining Act, 2001*, (the "Act") for a Board Ordered Essential Ambulance Services Agreement ("ESA"). Board File No. 0724-06-M is a reference by the Minister of Labour. The Minister asks the Board to advise him whether he has the authority to issue a "no board notice" at this time. Both of these matters arise out of the same circumstances, those being a dispute about whether

the City of Cornwall (the "City") and the Canadian Union of Public Employees, Local 3251 (the "Union") have agreed to refer to binding interest arbitration all matters which remain in dispute in the current round of collective bargaining for paramedics.

Summary

2. Although not framed this way in its application, the union has two complementary arguments to support its contention that the parties have agreed to interest arbitration for this and later rounds of bargaining.

3. The union's first argument is that when the parties agreed to create the paramedic bargaining unit in 2002, they also agreed that the paramedics' collective agreement would always be settled by interest arbitration if necessary. The union primarily relies on an unsigned Memorandum of Agreement dated November 27, 2002 (the "Unsigned November 27 Agreement") to support its contention. While the City agrees that the Unsigned November 27, Agreement is an agreement, it disputes the interpretation advanced by the union. In urging its interpretation the union argues the Unsigned November 27 Agreement is not ambiguous and requires interest arbitration. However, if the Unsigned November 27 Agreement is ambiguous the union relies on certain parole evidence including bargaining history, evidence of the union's expectations and other documents.

4. The union also asserts that the parties did, in 2003, enter into an ESA for the current round of bargaining. If that is the case, then the City's application must be dismissed. However, the union does not have a signed copy of that agreement and it acknowledges that no ESA document was signed. However, it has produced an ESA document which it asserts both parties agreed to. That ESA document provides that the collective agreement is to be settled by interest arbitration. The City disputes that it agreed to the ESA document.

5. I have carefully considered all of the arguments made by the parties and find:

(i) That the union has not proved that there is an agreement for "perpetual" interest arbitration.

(ii) That the union has not proved that there is already an ESA for this round of bargaining.

6. The critical facts are largely in dispute. The Board's task in fact determination is complicated because many of the important events took place several years ago. The ability of witnesses to accurately recall what happened is quite limited. Only one person, Barb Landry, the City's labour relations officer, took notes which are reliable, but they are sparse and clearly an incomplete record. She was also not present for all conversations between the parties' chief negotiators including those where the union says the ESA was agreed to. There was also a strong tendency for Ms. Landry to produce documents of "agreed to" clauses and in doing so used a computer style that was readily identifiable as hers by both sides. None of the documents which are in dispute in this case are in that style.

7. I am left attempting to fit the factual pieces together into something resembling a clear picture based on testimony from witnesses who acknowledged difficulties in recalling facts and a dismal documentary record.

The Facts

8. On January 1, 1998 the Province began the process of transferring, or "downloading" responsibility for land ambulance operations to upper-tier municipalities including counties, regions and district municipalities. The City is such an upper tier municipality.

9. The City applied to the Ministry of Health and Long Term Care to be declared the delivery agent for the provision of land ambulance services in the area and it was successful. Accordingly, on January 1, 2001 it became responsible for the costs and provision of ambulance services in the area.

10. CUPE Local 3251 was and is the bargaining agent for the City's "inside" workers. On the agreement of the parties, the thirty-nine ambulance workers who became employees of the City following its assumption of land ambulance services were placed in the existing "inside" bargaining unit. The City and CUPE agreed that the existing inside workers bargaining unit collective agreement which had a term of October 1 1998- September 30 2001 would apply to the paramedic employees with some necessary modifications. Further, the City agreed to recognize the accumulated seniority of the paramedics.

11. The parties entered into a written agreement to incorporate the paramedics into the existing inside workers bargaining unit. The agreement contained a new wage grid which was to apply to the paramedic employees. Most importantly, it also contained an ESA that would apply in case of a strike by the inside workers.

12. The inclusion of an ESA in the existing collective agreement was a curious thing. The Act requires that the parties *begin* to negotiate an ESA no later than 180 days before the collective agreement expires. However, the inside workers collective agreement was not to expire until almost 14 months later. Nevertheless, it is to be emphasized that in the July 2000 agreement, which brought paramedics into the inside worker collective agreement, the parties had reached an ESA for the 2001 negotiations.

13. In February 2001 the parties commenced negotiations for the next collective agreement. At the beginning of the negotiations the employer through its spokesperson, the City's Manager of Human Resources, Graham Dart, advised the union that the City was very interested in placing the paramedics in their own bargaining unit. The parties discussed the possibility of interest arbitration for paramedics in general terms.

14. Ms. Landry testified about the reasons the City had for wishing the paramedics to be in a separate bargaining unit from the inside workers. These reasons included the fact that paramedics have very different terms and conditions of employment and different operational requirements.

15. Ms. Landry also testified about the reasons the City was willing to consider interest arbitration for that round of bargaining. The City recognized that paramedics were seriously

underpaid and would be entitled to a large raise. The City negotiators believed it would be difficult to get the approval of City Council for that type of wage increase. However, if it was ordered by an interest arbitration board, there would be no choice. Ms. Landry was not present when the decision to agree to interest arbitration was ultimately made.

16. Robert Manny, the union's chief spokesperson at negotiations, testified the union was concerned about what the City could give it in exchange for agreeing to separate the paramedics. He testified that if the union was to obtain essentially permanent interest arbitration for the paramedics it might make sense to go forward as the City proposed, but even then he was not sure. Mr. Manny testified that it would make no sense to agree to interest arbitration for only one round of bargaining given that the splitting of paramedics into their own bargaining unit was essentially permanent.

17. Negotiations continued without an early resolution to the paramedics issue. One of the proposals for the 2001 collective agreement was an ESA. The union's proposal was that the previously agreed ESA should remain unchanged. The City's proposals also included an ESA. The City's essential services proposal was a slightly modified version of the ESA previously agreed. The union objected to the City's proposed changes to the ESA given that there was already an ESA in place for this round of negotiations and the 180 day period required by the Act was long past.

18. Negotiations continued for some time although there was a break when Mr. Dart became ill. In the Fall of 2002 the parties renewed discussions in earnest about placing the paramedics in their own bargaining unit as the City wanted. On October 22 there were discussions about interest arbitration which nobody can remember in detail. The notes taken of those discussions are not illuminating. Nevertheless, it is clear Mr. Dart told the union he would go to City Council to obtain approval to split the bargaining unit.

19. The starting point for an understanding of the formal discussions which led to interest arbitration (for at least that round of bargaining) is a letter sent by Barb Landry to Mr. Manny. That letter, dated November 7, 2002 is as follows:

> Further to yesterday's telephone conversation, The City is in agreement to proceed to Conciliation on November 26, 2002 with the last proposal presented to you on Tuesday, October 22, 2002.
>
> Your counter proposal was discussed with Council who directed Graham to continue to Conciliation in hopes of reaching a settlement.
>
> As you know, we have also booked November 27, 2002 for Conciliation with our Paramedics. In our meeting on October 22nd, Graham discussed the possibility of splitting the bargaining unit and having the Paramedics as a "stand alone" unit. If this is acceptable to CUPE, The City is proposing that we take the current CUPE Local 3251 collective agreement and insert the addendum into the appropriate Articles. The only addition would be the new Interest Arbitration language and any changes dealing with wages and benefits.
>
> Please let me know as soon as possible if this is acceptable with the Union.

Ms. Landry was not privy to the conversation which led directly to the last full paragraph. Ms. Landry testified that no "Interest Arbitration language" was ever included in the collective agreement. In her view, it was discussed on several occasions, but they could not come to an agreement.

20. On November 26, 2002 it appears that the parties negotiated again. No witness could remember in any detail what happened at that meeting. The notes that Ms. Landry took for that bargaining meeting were put into evidence as follows. The notes first reveal a series of discussions about paramedic wages. The parties were far apart. The union wanted the City's paramedics to be paid the same as other ambulance workers across the province. Mr. Dart indicated that council would not approve that. They continued:

> G.D. if % represents those items & you agree to being in still in disputes what % is
> I am prepared to say effect. Jan 1/03
> we pay 2% more on 23.40 & let Arb. Rule on f.......
> 23.87 on Jan 1
>
> Bob other option
> Interim rate & let Arb. Rule
>
> Benefits & Sick Leave – made Bob for all
>
> G.D. – ESA not part of c.a.
> Make proc. for arb. – L of U makes reference & ***see*** *how it works*.
>
> Our Concern – want to negotiate
>
> (Emphasis Added)

21. It appears what the parties decided to do on November 26 was to give paramedics a new interim rate of pay and let an arbitrator decide the final wages which is ultimately what occurred.

22. On November 27, 2002 the parties met in conciliation. There is no dispute that on that day they entered into the Unsigned November 27 Agreement, the meaning of which is entirely in dispute and the terms of which are as follows:

MEMORANDUM OF AGREEMENT

BETWEEN

THE CORPORATION OF THE CITY OF CORNWALL

AND

THE CANADIAN UNION OF PUBLIC EMPLOYES,
LOCAL 3251

The Parties have agreed to the following:

> WHEREAS the Local Union has agreed to split the existing bargaining unit into Paramedics and non-paramedics.
>
> IT is therefore agreed that the Corporation of the City of Cornwall and CUPE Local 3251 will proceed to Interest Arbitration under Article 40 of the *Ontario Labour Relations Act.*
>
> IT is further agreed that a Letter of Understanding will be attached to the existing contract.
>
> DATED this 27th day of November, 2002, in Cornwall, Ontario.

23. Both parties seemed to think that there was a signed version of this agreement somewhere, although neither side was able to locate it. It is not disputed that no Letter of Understanding was ever attached to the "existing contract". Neither side is aware of the existence of a Letter of Understanding.

24. There is also no dispute that on the same day, November 27, 2002 the parties entered into a "Memorandum of Settlement" (the "Signed November 27 Memorandum of Settlement") which was signed and states:

> **MEMORANDUM OF SETTLEMENT**
> **between**
> **THE CORPORATION OF THE CITY OF CORNWALL**
> **and**
> **THE CANADIAN UNION OF PUBLIC EMPLOYEES**
> **LOCAL 3251**
>
> **THE PARTIES AGREE THAT:**
>
> 1. The Paramedics (P1) maximum rate will be:
>
> | | |
> |---|---|
> | October 1, 2001 | $21.10 per hour |
> | October 1, 2002 | $23.40 per hour |
>
> The above rates are based on forty (40) hours per week.
>
> 2. **Interim Payment**
>
> The Corporation will pay an Interim Payment payable to all active employees as of November 27, 2002, on $2,500.00 to all full time employees and a pro-rated amount to part time employees based on their hours worked.
>
> The Interim Payment shall be adjusted as part of a final arbitrated decision. The Interim Payment shall be for the period October 1, 2001 to December 31, 2002. Included in the final award will be all hours not calculated for the above period. It is understood that all Paramedics having not worked more than 500 hours shall not receipt an Interim Payment.
>
> 3. It is also understood that the Corporation has agreed to the attached Appendix A and it will form part of this Memorandum of Settlement.

4. It is also understood that only the hourly rate and the percentage of the hourly rate for the years October 1, 2002 to September 30, 2003 and October 1, 2003 to September 30, 2004, will be the matters arbitrated.

5. It is further understood that the ratio P1 and P2's shall be maintained for the interim period.

6. Effective, January 1, 2003 a further 2% will be added to the hourly rate in lieu of Boot Allowance, Meal Allowance, Shift Differential, overtime rate for scheduled Training time and in lieu of 4.16% in lieu of benefits for part-time employees.

Dated at Cornwall, Ontario, this 27th day of November, 2002.

25. Neither party could identify with any certainty the attached "Appendix A", referred to in paragraph 3 of the Signed November 27 Memorandum of Settlement. Whether there is even an Appendix A at all is in dispute. The union led into evidence a "document" consisting of several pages stapled together. In that bundle was a different unsigned, memorandum of settlement which referenced the non paramedic employees. That document is undated, but the signing line refers to December, 2002. Except for the date, which suggests this bundle was put together later, this document is irrelevant. There was also a copy of the Signed November 27 Memorandum of Settlement. Finally the last stapled page is the following undated, unsigned Letter of Agreement ("Document X") which, in the union's view, constitutes Appendix A to the Signed November 27 Memorandum of Settlement :

LETTER OF AGREEMENT

Between

The Corporation of the City of Cornwall
(hereinafter referred to as "the City")

And

The Canadian Union of Public Employees
Local 3251 Paramedics
(hereinafter referred to as "the Union")

WHEREAS the bargaining agents for both sides have not been able to come to an Agreement;

AND WHEREAS the Parties have agreed to split the bargaining unit into Paramedics and Non-Paramedics;

NOW THEREFORE the City and the Union on its' own behalf and on behalf of all the members of the bargaining unit agree that:

1. In exchange to the split of the bargaining unit, the City agrees to Appendix "A";

2. The City also agrees to recognize the current Collective Agreement with Local 3251 with all its' changes to be transferred to the new bargaining unit (Until a

> new local union number is issued and under which the new bargaining unit will be called "Local 3251 Paramedics") as their legal Collective Agreement;
>
> 3. It is further agreed that for this round of negotiations only the wages for the Paramedics shall be forwarded to Arbitration;
>
> 4. The City recognizes that C.U.P.E. is the sole agent of the newly split bargaining unit;
>
> 5. The Parties agree to change the current scope clause in the Collective Agreement of Local 3251 to reflect the new bargaining unit.
>
> .../2

26. On its face the document suggests that there is a page 2. However, if there was a page 2 nobody could find it. The document also refers to an Appendix " A". If there was Appendix A nobody could find it. The document is also in a different font than the November 27, 2002 documents. Mr. Manny agrees that the document was not prepared by the City.

27. The union also tried to put into evidence a different bundle of stapled documents. This package includes the Unsigned November 27 Agreement, Document X, and the Signed November 27 Memorandum of Settlement.

28. Although the union is of the view that Appendix "A" to the Signed November 27 Memorandum of Settlement is Document X it has no real explanation for how there are two separate bundles of documents and if and why one bundle should be preferred over the other.

29. It is useful for clarity to determine the relevance of Document X at this point. In my view Document X is not an agreement and is largely irrelevant to my determination. Document X is unsigned, undated and does not even have a signing line. It references a page 2 but does not have a page 2. Moreover, it duplicates in some respects the Signed November 27 Memorandum of Settlement. For example, both documents contain a provision which refer wages for that round of bargaining to arbitration and both contain a statement that the paramedics are to be placed in their own bargaining unit. Although, it is unnecessary for me to decide this, it appears that Document X is a draft.

30. The union also led evidence about the internal decision-making process it went through to split the bargaining unit. It is unnecessary to review this evidence in any detail. Suffice it to say, that it is the unions' evidence that it believed at the time that the interest arbitration agreement was for more than one round of bargaining and it conveyed this to its members. Its position is that it would not have split the bargaining unit if interest arbitration was restricted to one round of bargaining.

31. In any event, following whatever agreements were made, there is no dispute that discussions regarding an ESA continued as did the negotiations generally.

32. On December 11, 2002 CUPE provided the City with a new written proposal for an ESA. Under the proposal, in the event of a "bargaining impasse", full ambulance services would be maintained and all matters in dispute would be referred to interest arbitration. The proposal

contained a detailed appendix about how interest arbitration would proceed. The proposal states that the ESA forms part of the collective agreement.

33. Mr. Manny testified that he and Mr. Dart discussed the union's proposal. Mr. Manny's recollection is that Mr. Dart had misgivings about it because he did not want to be bound by interest arbitration forever. Accordingly, the City did not accept the ESA proposed by CUPE. The City's pleadings suggest the City prepared its own written ESA and presented it to the union but it is not clear if the pleadings are correct and there was no evidence on this point. The City's alleged proposed ESA also provided that full ambulance services be maintained and provided for binding interest arbitration of disputes. However, it also provided that the ESA could be terminated up to 190 days prior to the expiry of the collective agreement.

34. Mr. Manny testified that he agreed to the changes proposed by Mr. Dart which were paragraphs 8 and 9 and indicated his agreement to Mr. Dart. However, it was not signed. In Mr. Manny's recollection he sent the following agreement to the City which constitutes their ESA:

ESSENTIAL AMBULANCE SERVICES AGREEMENT

BETWEEN:

CORPORATION OF THE CITY OF CORNWALL

(hereinafter "the City")

- and -

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 3251

(hereinafter "the Union")

WHEREAS the Union is the bargaining agent authorized to represent the ambulance workers employed by the City;

AND WHEREAS the City and the Union are negotiating a collective agreement for the ambulance workers;

AND WHEREAS the *Ambulance Services Collective Bargaining Act, 2001* requires the parties to negotiate an essential ambulance services agreement (EASA);

NOW THEREFORE the City and the Union, on its own behalf and on behalf of all of the members of the bargaining unit, agree that:

1. Following the giving of notice of desire to bargaining under section 59 of the *Ontario Labour Relations Act*, the parties agree that they will meet and bargain in good faith and make every reasonable effort to made a collective agreement.

2. During this negotiation process, either party may request that the Minister of Labour appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

3. Should the Minister be informed by the conciliation officer that he/she has been unable to effect a collective agreement, and the Minister has issued a notice to the parties informing them that he or she does not consider it advisable to appoint a conciliation board (the "No Board": report0, then a bargaining impasse shall be created.

4. In the event of a bargaining impasse, the parties agree to maintain all essential and non-essential ambulance services, as determined by the City.

5. In the event of a bargaining impasse, the number of ambulance workers required to provide all essential and non-essential ambulance services, shall be the same number which was required to provide ambulance services immediately prior to the bargaining impasse.

6. The terms and conditions of employment and of the Collective Agreement of the ambulance workers in the bargaining unit and any rights, privileges or duties of the ambulance workers or the City or the Union in relation to the ambulance workers continue in effect until a new Collective Agreement is made unless the City and the Union agree otherwise.

7. Where the parties reach a bargaining impasse, they irrevocably agree that all matters remaining in dispute will be referred to a board of arbitration for final and binding determination in accordance with Appendix "A" of this Agreement and section 40 of the *Ontario Labour Relations Act, 1995*.

8. A party may terminate this Agreement, by giving the other party written notice of its termination, if the parties have a collective agreement and there are at least 190 days left in its term.

9. The parties agree that when a bargaining impasse is reached, then the Union and its members shall not engage in a strike and the City shall not lockout the Union or its members.

APPENDIX "A"

1. The parties shall each appoint to a Board of Arbitration a member who has agreed to act for that party. Such appointment shall be made no later than 50 days from the date on the "No Board" report.

2. Where a party fails to appoint a member of a Board of Arbitration within the time mentioned above, either party may request in writing that the Minister of Labour appoint such member.

3. Where the two members appointed by or on behalf of the parties fail within 20 days after the appointment of the second of them to agree upon the third members, the third member shall be appointed by the Minister of Labour.

4. If a person ceases to be a member of a Board of Arbitration by reason of resignation, death or otherwise, before it has completed its' work, the party whose point of view was represented by such person shall appoint a member in his or her place. If such person is the Chair, the other members of the Board of Arbitration will select a new person in accordance with this Agreement.

5. The Board of Arbitration shall hold the first hearing within 90 days after the last member of the Board is appointed or such time frame agreed to by the parties.

6. The Chair and the other members of a Board of Arbitration established under this Agreement, have all the powers of a Board of Arbitration under the *Labour Relations Act, 1995*, s.48(12), (18)-(20); pursuant to Section 96 of the *Labour Relations Act, 1995*, as a proceeding settled pursuant to the Act.

7. Where, during the bargaining between the parties or during the proceedings before the Board of Arbitration, the parties have agreed upon some matters to be included in the Collective Agreement and have notified the Board in writing of the matters agreed upon, the decision of the Board shall be confined to the matters not agreed upon by the parties and to such other matters that appear to the Board necessary to be decided to conclude a Collective Agreement between the parties.

8. If either of the parties fail to execute the document prepared by the Board within a period of five days from the day of its' submission by the Board to them, the document shall come into effect as though it had been executed by the parties and the document thereupon constitutes a Collective Agreement under the *Labour Relations Act, 1995*.

9. The Board of Arbitration shall remain seized of and may deal with all matters in dispute between the parties until a Collective Agreement is in effect between the parties.

10. The remuneration and expenses of the members of a Board of Arbitration shall be paid as follows:

    i) A party shall pay the remuneration and expenses of a member appointed by or on behalf of the party.
    ii) Each party shall pay one-half (1/2) of the Chair's remuneration and expenses.
    iii) The Parties agree to proceed with Interest Arbitration pursuant to HLDAA as if it applies to the Parties.

SIGNED in Cornwall, Ontario this _____ day of _, 2003

FOR THE CITY FOR THE UNION

__________________ ______________

__________________ ______________

__________________ ______________

35. Mr. Dart, who is no longer employed by the City, testified that he has little recollection about what happened in connection with the events which are the subject of these matters. Virtually all of what he testified to was preceded by the words "I would have". In other words, he was speculating about what his likely course of action would have been rather than actually testifying about his recollections.

36. The one aspect of Mr. Dart's testimony I find interesting is Mr. Dart's evidence that he "would not have agreed" to perpetual interest arbitration. Of course, this is not really what the union alleges. Mr. Manny's testimony is that Mr. Dart was opposed to "perpetual interest arbitration" and accordingly the parties agreed to an "opt out" clause. Mr. Dart's testimony about what he "would have" done is entirely consistent with the union's version of the facts.

37. In any event, bargaining continued slowly. Eventually, more than just wages had to be settled by interest arbitration. On June 18, 2003 the parties agreed there were five issues, including wages and the duration of the contract, which would be put before the interest arbitrator.

38. Prior to the interest arbitration, Ms. Landry prepared a draft collective agreement. Mr. Manny read it and asked that the ESA be included. Ms. Landry asked Mr. Manny if they really needed the ESA since they were going to arbitration. Mr. Manny agreed they did not and the collective agreement was eventually prepared without it. Ms. Landry does not deny that this conversation took place. It is unclear however, whether they were talking about the same ESA given that the parties certainly had an ESA for that round of bargaining.

39. An arbitration hearing was held before a Board of Arbitration chaired by Jane Devlin, and the Board issued its award on September 30, 2003. Neither the agreed to items or the items determined by the Devlin Board included an ESA or any reference to interest arbitration. Accordingly, there is no ESA or any reference to interest arbitration in the collective agreement document.

40. The collective agreement imposed by the Devlin Board expired on September 30, 2004. Negotiations for a renewal collective agreement commenced on January 16, 2006. Mr. Manny testified that in opening presentations he told the City that if the parties were unable to resolve the collective agreement, they would resort to arbitration to settle the agreement. The union's position is that the City did not object to this characterization and this demonstrates the existence of the interest arbitration agreement. The City's witnesses denied this allegation.

41. The City had a new spokesperson, Robert Menagh, who had replaced Mr. Dart who had moved to a position with the City of St. Thomas. Negotiations proceeded slowly. At a point in the negotiations it became apparent that the parties had a difference of opinion as to whether interest arbitration was mandatory if there was a breakdown in negotiations. Mr. Manny told Mr. Menagh that the union could always just go to interest arbitration if they did not get a deal. Mr. Menagh's response was: "It takes two to tango". The union relies on Mr. Menagh's response in support of its position that the City was already aware of the union's right to go to interest arbitration.

42. Negotiations broke down. The City then brought the ESA application and the Minister referred his question when the employer sought a "no board" report.

Decision

Does the Unsigned November 27 Memorandum of Agreement Provide For "Perpetual" Interest Arbitration on its Face?

43. The union's primary position is that the parties agreed at the time they split the paramedics into their own bargaining unit to "perpetual" interest arbitration, that is that all future collective agreements would, if necessary, be determined by an interest arbitrator or board of arbitration. It argues that agreement is clearly established by the Unsigned November 27 Agreement.

44. CUPE has, of course, much experience with interest arbitration given its extensive representation of employees in the hospital sector. However, interest arbitration in the non-hospital sector is contextually a different matter and has been the subject of some controversy. Agreements which purport to limit the right to strike or lock out have been the subject of much litigation. It is not necessary for me to review the controversy in detail. However, there may be some doubt given the provisions of the *Labour Relations Act*, whether such an agreement can even be binding (See *Re Grey-Owen Sound Health Unit & Ontario Nurses Association* [1979] 24 O.R. (2d) 510 for a discussion of the issue in a slightly different context). It is, however, not necessary for me to decide this issue.

45. Nevertheless, it is within this complex legal realm in which the parties negotiated the creation of a new bargaining unit for paramedics. The City argues that the Board should only find an interest arbitration agreement if there is clear and cogent evidence of such an agreement. The City argues, in effect, that a higher standard (clear and cogent evidence) is necessary where the union seeks to deprive the City of a statutory right- the right to lock out. The City argues that the union has not met that burden.

46. Although the City did not cite an authority for its position, support can be found in the Supreme Court of Canada's decision in *Bradburn v. Wentworth Arms Hotel Ltd.* [1979] 1 S.C.R. 846 at p.861 which is cited in the *Grey-Owen* case with approval. In *Bradburn* the Court stated:

> It would take the clearest possible language in my view to drive a court to an interpretation which would find the parties voluntarily stripping themselves of the opportunity to call to their aid the provisions of the statute to change a collective agreement, and to substitute for those proceedings so traditional now in the labour relations of our community, a permanent agreement continuing until both parties agree on a replacement agreement.

47. Given the standard described by the Supreme Court in *Bradburn*, the union's argument that the Unsigned November 27 Agreement reflects an agreement for perpetual interest arbitration must surely fail. I refer first to the third paragraph of the Unsigned November 27 Agreement which is the primary provision relied on by the union and which must provide the clearest possible language:

> It is therefore agreed that the Corporation of the City of Cornwall and CUPE Local 3251 will proceed to Interest Arbitration under Article 40 of the *Ontario Labour Relations Act*.

48. Most striking is the complete absence of language which one would normally expect if the parties agreed to interest arbitration forever, as the union alleges. There could, of course, be numerous ways to describe that agreement, but a phrase like "all future collective agreements" might have been expected. This alone is probably fatal to the union's argument.

49. Moreover, the reference to s. 40 of the Labour Relations Act is counter intuitive if the union's position is correct. S.40 states as follows:

> **40.** (1) Despite any other provision of this Act, the parties may at any time following the giving of notice of desire to bargain under section 16 or 59, irrevocably agree in writing to refer all matters remaining in dispute between them to an arbitrator or a board of arbitration for final and binding determination.
>
> (2) The agreement to arbitrate shall supersede all other dispute settlement provisions of this Act, including those provisions relating to conciliation, mediation, strike and lock-out, and the provisions of subsections 48(7), (8), (11), (12) and (18) to (20) apply with necessary modifications to the proceedings before the arbitrator or board of arbitration and to its decision under this section.
>
> (3) For the purposes of section 67 and section 132, an irrevocable agreement in writing referred to in subsection (1) shall have the same effect as a collective agreement.

50. It is apparent from its language that s. 40 is primarily and possibly entirely directed at parties who decide during bargaining to refer outstanding issues to interest arbitration. Wilson J.A. in *Grey-Owen* described it this way at p.517:

> In my view the consensual reference contemplated by s. 34c [now 40(3)] is a consensual reference of all matters which the parties have attempted unsuccessfully to negotiate. This seems to me to be clear from the use of the words "all matters remaining in dispute between them". I do not think the parties can agree under s. 34c to avoid their obligations to negotiate in good faith in an attempt to reach a new collective agreement. Sections 14 to 33 of the Act are expressly made applicable by s.46 to the bargaining that is intended by the Legislature to follow upon the giving of notice under s.45. How then can the parties divest each other *in futuro* of the statutory bargaining procedure and compel each other to submit to compulsory arbitration?

51. I do not wish to preclude the possibility that parties agree in one round of negotiations to later agree that a subsequent round (or possibly rounds) of bargaining can be resolved by interest arbitration under s.40. However, I see nothing in paragraph 3 of the Unsigned November 27 Memorandum of Agreement which leads me to conclude that the parties have done that in this case. Indeed, the reference to s. 40 in the absence of any further detail is strongly suggestive that, in accordance with that section, as described by the Court of Appeal in *Grey-Owen*, the parties have agreed to refer matters in dispute in the then current round of bargaining to interest arbitration.

52. The last paragraph of the Unsigned November 27 Agreement also undermines the union's argument. It provides that a Letter of Understanding will be attached to the "existing" collective agreement. That suggests that the Letter of Understanding deals with the current round of bargaining. Had it been for future rounds, the provision surely would have said that the Letter would be attached to the collective agreement to be negotiated. In addition, the Letter of Understanding, which it appears was supposed to put the "meat on the bones" of the parties

agreement, was not attached to any collective agreement. In fact, it appears no Letter of Understanding was ever negotiated.

Does the Parole Evidence Lead to A Different Conclusion?

53. The Union argues that if the Board finds that the Unsigned November 27 Memorandum of Agreement is ambiguous then the parole evidence supports its interpretation of the parties' agreement. Even assuming, without finding, that the Unsigned November 27 Memorandum of Agreement is ambiguous, I am unable to agree with the union's argument.

54. I will start by dealing with the evidence which I find not to be of assistance in any determination. First, I am not satisfied that the evidence concerning the union's internal discussions do anything more than demonstrate that the union believed it was getting long-term interest arbitration, although even that is not clear. Even so, that is not helpful evidence of what terms were actually agreed to. Second, it is clear to me that the evidence of the 2006 negotiations is of limited assistance. If Mr. Manny did advise the City in his opening statement that the union could have resort to interest arbitration, the weight of such a statement and the City's failure to reply to it is minimal. I also take nothing from Mr. Menagh's "it takes two to tango" statement as such a statement is completely consistent with the City's view of the case.

55. In order to demonstrate an agreement on particular terms a party must demonstrate offer and acceptance of those terms. The parole evidence should at a minimum do that in order to advance the interpretation sought. In this case there is a complete absence of detailed evidence of such offer and acceptance at the point at which an agreement was actually made. What were the conversations? What were Mr. Dart's and Mr. Manny's words? What language did they use to describe "perpetual" interest arbitration? None of this was put into evidence. If the union is right, the parties were agreeing to something quite extraordinary. The extraordinary nature of the agreement is not reflected in the written agreement. Nor, more importantly for this part of the discussion, is it reflected in the evidence of the words the parties used.

56. The only specific evidence is Ms. Landry's notes of the meeting held on November 26, the day before the agreement, and they do not support the union's position. Those notes have Mr. Dart as saying in effect: "The ESA is or will not be part of the collective agreement". "Make procedure for arbitration" "Letter of Understanding makes reference and lets see how it works". I take this all to mean that Mr. Dart proposed that they would agree in an ESA and not in the collective agreement on a *procedure* for interest arbitration. It is clear to me that the Unsigned November 27 Memorandum of Agreement, whatever it is, does not contain a *procedure* for interest arbitration. As the Unsigned November 27 Memorandum of Agreement states, the procedure would be negotiated later as part of a Letter of Understanding. Most importantly Mr. Dart discussed "see[ing] how it works". Those words are incompatible with the union's interpretation.

57. A further blow to the union's case is the conduct of the parties in the months immediately following the Agreement. What did they do? They commenced bargaining an ESA. During the course of those negotiations it is alleged that Mr. Dart expressed reservations about the union's proposal which, in his view, provided perpetual interest arbitration. Did Mr. Manny, as one would have expected, respond by telling the City that the parties already agreed to perpetual interest arbitration as part of the splitting off of the paramedics? There is no evidence

that he did. In fact the evidence is nearly the opposite. Mr. Manny responded to the City's concerns by proposing an ESA that could be terminated before notice to bargain was given in the next round! This evidence is a blow to the union's position. It is also a blow to the union's position that it would never have agreed to split the paramedics into their own bargaining unit for only one round of interest arbitration. In fact what the union asserts it proposed provides for the possibility of the very outcome which the union asserts it would never have agreed to. Why would the union propose/agree to an interest arbitration agreement that could be terminated if, as it alleges, it already had the City's commitment to perpetual interest arbitration?

58. Mr. Manny's discussion with Ms. Landry is also of no assistance to the union's interpretation. Had the parties negotiated permanent interest arbitration, he surely would have insisted that agreement be reflected in the collective agreement. Her response that there was no use putting the agreement in the collective agreement because they were already going to interest arbitration and his acquiescence in that decision is much more consistent with the City's interpretation than the union's.

Was There An ESA Negotiated In 2003?

59. In late November 2002 the parties had agreed to refer wages at least to interest arbitration and had agreed to split the bargaining unit. However, as noted, that is not the end of the matter. The parties continued to talk about interest arbitration, albeit now in the context of an ESA. If there was an ESA negotiated on the terms argued by the union the union must succeed since there is no dispute that the City did not give notice to terminate the ESA 190 days prior to the end of the collective agreement.

60. I have already described these discussions as curious since the parties already had, as they were required to, negotiated an ESA for that round of bargaining when the paramedics first came to the City. These discussions are also curious in view of the Act. Section 3 of the Act states as follows:

> **3.** (1) An employer and a trade union who are bound by a collective agreement or who are negotiating a first collective agreement shall negotiate an essential ambulance services agreement. 2001, c. 10, s. 3 (1).
>
> (2) If they are bound by a collective agreement, they shall begin to negotiate an essential ambulance services agreement no later than 180 days before the collective agreement expires. 2001, c. 10, s. 3 (2).
>
> (3) If they have never had a collective agreement, they shall begin to negotiate an essential ambulance services agreement,
>
> (a) no later than 15 days after notice is given under section 16 of the *Labour Relations Act, 1995*; or
>
> (b) if no notice was given under that section but the parties have met and bargained, no later than 15 days after their first meeting. 2001, c. 10, s. 3 (3).
>
> (4) An employer and a trade union may begin to negotiate an essential ambulance services agreement at a time later than that required under subsection (2) or (3) if they agree to do so. 2001, c. 10, s. 3 (4).

> (5) They shall bargain in good faith and make every reasonable effort to make an essential ambulance services agreement. 2001, c. 10, s. 3 (5).
>
> (6) If an employer is represented in collective bargaining by an employers' organization, the employers' organization may negotiate and make an essential ambulance services agreement on the employer's behalf. 2001, c. 10, s. 3 (6).
>
> (7) If a trade union is represented in collective bargaining by a council of trade unions, the council of trade unions may negotiate and make an essential ambulance services agreement on the trade union's behalf. 2001, c. 10, s. 3 (7).

61. Under s.3(2) the parties are free to commence bargaining an ESA at any time prior to 180 days prior to the end of the collective agreement. The Act does not contemplate that such negotiations should result in an ESA that would form part of the collective agreement. In fact, the opposite is normally true: an ESA is usually a stand-alone document. In fact an ESA negotiated as part of a collective agreement is potentially fraught with complications related to whether it survives the end of the collective agreement.

62. Although they were under no legal obligation to do so, there is no doubt that ESA negotiations took place between the parties beginning in late December 2002. It is unclear why they were doing this. It may be that they were attempting to negotiate a Letter of Understanding in accordance with the Unsigned November 27 Memorandum of agreement. It may be that they believed they were required to negotiate the ESA for the next round of bargaining at that point. But that is just speculation.

63. It is somewhat unclear whether the ESA which the union asserts is in place was negotiated for the then current round of bargaining only. However, on balance I am satisfied it was not: It is clear to me that the parties were negotiating an ESA for the next round of negotiations (which would eventually take place in 2006) and not for the period which followed the expiry of the collective agreement which term finished in 2001. I come to that conclusion for several reasons. First, there was already in place an ESA for the 2001-2004 round of bargaining, that being the one negotiated when the paramedics were first put under the inside collective agreement. Second, the first paragraph of the ESA states: "Following the giving of notice of desire to bargain". That paragraph makes no sense in an ESA for the 2001-2004 round of bargaining since notice to bargain had been given several months before. Similarly paragraph 2 of the agreement contemplates the prospective appointment of a conciliation officer when one had already been appointed in 2002. Moreover, the termination provision makes no sense if the ESA were only to apply to current bargaining since the 190 day period had long since passed.

64. If there is an ESA as the union alleges, then it is clear that the parties must proceed to interest arbitration and the City's application must be dismissed. However, the determination of whether the ESA was actually agreed to is somewhat complicated. The Act does not appear to require (as does the *Labour Relations Act* with respect to collective agreements) that an ESA be in writing and signed. Therefore, the union's acknowledgement that the ESA was not signed is probably not fatal to its position. But was there an agreement?

65. There was little direct evidence on this point, but what there is, is worth considering in detail. Since the City did not call any direct evidence to contradict Mr. Manny it is Mr. Manny's testimony which must be scrutinized.

66. In examination in chief Mr. Manny was asked what happened after the November 27 agreements. He testified that he wrote up an agreement to go to arbitration and then sent it to Mr. Dart. Mr. Dart had misgivings about it. Mr. Dart rewrote it so that it contained an escape clause, which was the 190 day termination provision.

67. Mr. Manny was asked why Mr. Dart had misgivings. He testified that Mr. Dart wanted an escape clause. Mr. Manny was then asked if Mr. Dart had misgivings about anything else. Mr. Manny replied that he did not know of any other misgivings.

68. Finally, Mr. Manny testified that they went to arbitration. He was asked in examination in chief: "Did you have agreement on the language [of the ESA]. He replied: "I think we did. We did not sign it, but I made the changes that he demanded". Mr. Manny identified the document contained in the City's pleadings (which the City identified as its proposal) as the document which he had changed to reflect Mr. Dart's concerns about an escape clause.

69. In order for there to be an agreement the Board must be satisfied that despite the absence of signatures on the document the parties had agreed to the ESA. I find it impossible to come to that conclusion based on Mr. Manny's evidence. There is no evidence before me that the union presented the final document to City and the City said "yes, we agree with that" or something equivalent. At most, the union's evidence demonstrates that the union responded to the City's concerns and drafted an agreement which reflected those concerns.

70. I therefore conclude that the parties: (a) did not agree to perpetual arbitration when they agreed to place the paramedics into their own bargaining unit; and (b) also have not agreed to an ESA for the current round of bargaining. Accordingly, the City's application in Board File No. 0625-06-M can proceed. The union has not responded on the merits of the City's ESA proposal. It shall have until January 26, 2007 to do so. The Board will then determine whether a further hearing is necessary to conclude this matter.

71. The Board answers the question posed by the Minister of Labour as follows:

> The Board advises the Minister that he does have the authority to issue a no board report.

3070-04-OH Kym Urry, Applicant v. **TransHelp of the Regional Municipality of Peel**, Responding Party v. Canadian Union of Public Employees Local 966 TransHelp, Intervenor.

Discharge – Health and Safety – Reprisal – The applicant challenged her dismissal as a bus driver for the disabled – She was discharged after four incidents within a twelve-month period (three accidents and an instance of driving while her licence was suspended) – The applicant argued that every time she found a problem with her bus, or

requested a change of bus because of an apparent malfunction, she was exercising her rights under the *Occupational Health and Safety Act* – The Board held (1) these concerns were handled by the maintenance department of the employer, (2) management was never made aware of them, and (3) these concerns could not be construed as an exercise of health and safety rights within the meaning of the Act – The Board found that progressive discipline was levied against the applicant in accordance with management policy and the collective agreement, and that termination was the appropriate response to the culminating incident – Application dismissed

BEFORE: *Patrick Kelly*, Vice-Chair.

APPEARANCES: *John Villella, Kym Urry* and *John Gable* appearing for the applicant; *Ann Dinnert, Leanne Gray, Shelley Ayres* and *Alf Stockwell* appearing for the responding party; *Brian Sheehan* appearing for the intervenor.

DECISION OF THE BOARD: January 25, 2007

1. This is an application under section 50 of the *Occupational Health and Safety Act*, R.S.O. 1990, c.O.I, as amended ("the Act"). It was filed with the Board on December 7, 2004.

2. The applicant, Kim Urry, was terminated from her employment on December 10, 2003. Throughout her approximately three years of employment with the Region of Peel ("Peel"), she had been a unionized bus driver with TransHelp, a transit service for the disabled, operated within Peel's Social Services Department. Within a span of twelve months preceding her termination, she was involved in three accidents. In addition, her driver's license (including her "B" designation as a bus driver) was suspended due to her failure to pay a fine arising from a speeding ticket issued against her when she was off work. Ms. Urry was disciplined for each incident, including her dismissal following the third accident. All four incidents were relied upon by Peel in the letter of termination issued to the applicant. The letter of termination also referred to four other minor instances of discipline, which were later removed from the letter through the assistance of the intervenor (the "union" or "CUPE").

3. Ms. Urry grieved her termination[1]. She did not, however, grieve any other discipline imposed by Peel, although she was entitled to have asked her trade union to do so.

4. The key issue to be determined is whether Peel terminated Ms. Urry solely because of her driving record as described above, or whether the reasons for termination included the exercise of her rights under the Act.[2] If the termination was a reprisal, the applicant is entitled to reinstatement and perhaps compensation. If not, I nevertheless have a residual discretion under

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[1] The union's handling of the termination grievance is a key issue in a duty of fair representation complaint filed by Ms. Urry which, at the time of this decision, was still pending before the Board. It would appear that the grievance was ultimately withdrawn by CUPE, but in circumstances about which there is little agreement between the parties in that matter.

[2] In a previous decision in this matter dated September 30, 2005 I declined to deal with each instance of discipline issued against the applicant as a reprisal under the Act because, apart from the termination itself, Ms. Urry never grieved those disciplinary penalties, and did not explain to the Board why she took as long as she did to complain about them to the Board. I also stated in that decision that I would take into account in the final decision her lengthy delay in complaining about the termination.

subsection 50(7) of the Act to substitute the dismissal with a lesser penalty if that is found to be appropriate in all the circumstances. And so, the secondary issue in this case is, even if there was no unlawful reprisal, whether or not circumstances exist which would justify substitution of Ms. Urry's termination with some less harsh form of discipline. In the event I do not deem it appropriate to substitute a lesser penalty, the application will be dismissed.

The Evidence

5. Eight witnesses testified over the span of thirteen hearing days. Shelley Ayres, one of Ms. Urry's two supervisors; Alfred Stockwell, the Manager of TransHelp; and Mary Killeavy, a Human Resources representative, testified on behalf of Peel. For the applicant, I heard testimony from Ms. Urry; Vee Nicholas, the applicant's other supervisor; Eustace Del Sol, a maintenance employee; Heather Potvin-Hook; and Dianne McRae. As one might expect, there were some discrepancies among the various versions of events described by the witnesses. I shall describe and resolve those discrepancies that are material to the issues I have to determine in the course of the reasons that follow.

6. It may be useful at this point to note some observations concerning some of the major witnesses. Ms. Nicholas was a key witness on behalf of Ms. Urry. She was the supervisor who issued most of the disciplinary letters to the applicant, including two suspensions and the letter of termination. According to Peel's witnesses, Ms. Nicholas was always in agreement with Peel's disciplinary responses to the applicant. According to them, she also agreed with Ms. Urry's termination. In fact, everyone including Ms. Nicholas agreed that upon learning that Ms. Urry had been involved in her third preventable accident which led to her dismissal, Ms. Nicholas announced "We've got her now" or words to that effect. And yet, when she testified in this proceeding, Ms. Nicholas claimed that Peel management was out to get Ms. Urry. She was not sure that the reasons were necessarily related to health and safety, although she was more than willing to speculate that they could have been.

7. It may be that Ms. Nicholas's curious change of heart owes something to her dismissal from Peel in mid-2004, well after Ms. Urry's departure. Ms. Nicholas insisted she was not dismissed, that she chose to leave TransHelp, but the fact of the matter is that, following a management study, she was found to be wanting as a TransHelp manager, and Peel took steps to remove her in that capacity. She had some say in how her departure was handled. Other employment options elsewhere in the Peel organization were discussed with her. None of that changes the fact that she was terminated. My sense is that she is a proud individual who would not necessarily take her own dismissal lightly, or for that matter, graciously. Although I do not suggest she tried to mislead the Board, nevertheless I regard her testimony with a degree of caution, especially where it conflicts with the evidence of other witnesses on material facts.

8. Ms. Urry's evidence too had its share of problems. There was some inconsistency and self-serving exaggeration. At times, she demonstrated an astonishingly precise sense of recall regarding events years earlier that were otherwise unremarkable. For example she could remember the precise date and circumstances when she allegedly raised a concern with Ms. Ayres and Ms. Nicholas concerning a problem with her two-way radio. And yet, she misconstrued Ms. Nicholas's testimony, which she heard in its entirety over the course of several hours, with respect to the investigation of Ms. Urry's third and final accident. She thought Ms. Nicholas testified about a visit to the police station following that accident, when in fact, Ms. Nicholas

gave no such evidence. Ms. Urry also testified, at one point, about having considered an appeal of a finding of preventability regarding her third accident, but later could not recall having made such a claim.

9. All of Ms. Urry's accidents were preventable and clearly her fault, but she spent a great deal of time as a witness excusing or diminishing her culpability. I found Ms. Urry had a tendency to rationalize her own behaviour and conduct, and to draw negative conclusions quickly about the motivations behind the conduct of anyone, other than Ms. Nicholas, who played a part in her discipline or termination. So, for example, in the course of her testimony she demonized Mr. Stockwell as her harasser on the basis of second hand comments she heard from another individual (and took no action in protest until well after her termination from employment.) Ms. Ayres was painted as an abusive supervisor based, in large part, on an incident involving a confrontation with a co-worker, to which Ms. Urry was not a witness. She also insisted in her evidence that Ms. Killeavy attempted to sabotage both her application for employment insurance benefits and her prospects of employment elsewhere, in the face of overwhelming evidence to the contrary. In other words, Ms. Urry showed an inclination to believe what she wanted to believe, and appeared to reconstruct events in a manner designed to advance the position that she was a victim of a health and safety reprisal.

10. On the other hand, I had no hesitation accepting the testimony of Mary Killeavy, Peel's Human Resource representative at the time of Ms. Urry's termination. Ms. Killeavy had key involvement in the termination of Ms. Urry. When Ms. Killeavy testified, she was no longer employed by Peel. She had nothing to gain personally in giving her evidence, from what I could see, other than possibly clearing her name in light of several rather serious allegations made by the applicant against her, all of which I have determined had not the slightest foundation. She gave her testimony in a very straightforward manner, recalling what she could and conceding when she could not.

11. Mr. Stockwell too struck me as a candid witness. For example, in discussing the disciplinary response to the preventable accident of maintenance employee Eustace Del Sol in early August 2002, Mr. Stockwell conceded the possibility that he had been a little too lenient with Mr. Del Sol. He attributed that to being brand new on the job, and being hesitant to assert his authority too vigorously, a characterization that Ms. Nicholas essentially confirmed when she testified. Mr. Stockwell also conceded the possibility that his power of recall was not infallible on all points. He was very consistent as he gave his testimony. For all these reasons, I find his evidence was reliable.

12. Ms. Ayres was also largely consistent when she testified. She may have understated her capacity for being confrontational and quick-tempered with staff, of which there was some evidence. However, she had a very good grasp of the events that were material to the determination of the issues that mattered in this proceeding.

The structure, staffing and activities of TransHelp

13. The operations function involves about 45 bus drivers, two dispatchers and two schedulers in the day-to-day transit service to disabled citizens of Peel Region. The drivers require "B" licenses to operate a bus carrying passengers.

14. There are about six people in the maintenance function. Their job is to keep the buses in working order. The maintenance people do not require "B" licenses, because, though they sometimes drive buses in the yard, and occasionally take replacement buses out to drivers who have encountered mechanical problems, they do not transport members of the public.

15. There is a high degree of integration between the operations and maintenance functions. Generally, it is the drivers who discover the day-to-day problems with the buses, and it is the maintenance mechanics who fix the problems. The process involves the drivers completing TransHelp Maintenance Request forms which identify the issues to be addressed by maintenance. These forms generally go directly to the maintenance people and are not reviewed by management. There is also a regular maintenance program of routine, regular inspection and service of the vehicles. In the course of the hearing, the applicant's representative attempted to cast some doubt as to whether the brake systems of the vehicles driven by the applicant were properly maintained, but without much, if any, foundation.

16. Shelley Ayres and Vee Nicholas were the two Operation Supervisors responsible for maintenance and operations respectively. They were appointed to their full time permanent positions in the fall of 2002. Prior to that, for about a period of one year, Ms. Nicholas had been the sole incumbent, in an acting role.

17. Ms. Ayres took on the maintenance function, but covered for Ms. Nicholas, and vice versa. Both had dealings with Ms. Urry.

18. Mr. Stockwell became the Manager of TransHelp near the end of July 2002, replacing the incumbent, Norm McLeod. Prior to that, Mr. Stockwell had held a similar management position with the City of St. Catherines. Mr. Stockwell introduced or oversaw a number of changes in TransHelp as a result of a rash of bus accidents in the first half of 2002 when TransHelp was under Mr. McLeod's supervision. All of these new initiatives were designed to improve accountability, and particularly driver accountability, for the safe operation of TransHelp vehicles. That, it will be seen, turns out to have been a particularly significant development for the purposes of this case.

19. One of the changes was the introduction of "circle checks". The drivers became responsible for carefully examining the exterior and interior of their vehicles for a variety of defects (57 in total) and for damage at the beginning of each shift, and recording their findings on duplicate Daily Inspection Reports. So, for example, if a headlight was not working, or a fire extinguisher was not fully charged, or the horn was not operating, these were to be noted. In addition, any damage to the body of the bus was to be described. This way, if a bus arrived in the yard at the conclusion of a shift with new body damage that had not been previously noted, the driver would have to accept responsibility.

20. A second change occurred early in 2003, with the creation of an Accident Review Committee ("the ARC"). It consisted of a management representative and a worker representative. Its sole purpose was to determine whether TransHelp vehicle accidents were preventable or non-preventable. Preventable accidents were considered the fault of the TransHelp driver. The findings of the ARC were then forwarded to the appropriate management personnel for a determination of discipline, if appropriate.

21. The third change concerned the concept of progressive discipline for preventable accidents, and the notion that when considering what discipline to impose, the driver's entire accident record of preventable accidents ought to be considered. Prior to Mr. Stockwell's arrival, each accident was simply reviewed in isolation. After his arrival, all preventable accidents on a driver's record were considered in the assessment of discipline.

22. The fourth change was a program of "refresher" training for the drivers. This training was introduced for the purpose of giving the drivers a fair chance in the new disciplinary regime. According to Ms. Nicholas, all the drivers were put through the training unless they were on vacation or sick at the time. Ms. Urry claims she never received the refresher training (or, for that matter, any other driver training offered by TransHelp), but offered no explanation as to how she was overlooked. In any event, she did not raise lack of training as grounds in the grievance process for challenging any of the discipline imposed against her. As I have noted, the only time she actually engaged the grievance procedure was to challenge her termination.

23. There has been for some time a joint health and safety committee functioning in the TransHelp workplace. It consists of more worker representatives than management representatives. It has a union and management co-chair. At one point, Ms. Nicholas was the management co-chair. The committee keeps minutes of its meetings and posts them in the workplace.

The applicant's health and safety concerns

24. Ms. Ayres and Mr. Stockwell steadfastly denied that Ms. Urry ever complained to them about matters of health and safety. Ms. Nicholas did not refer specifically to any health and safety concerns brought to her attention by the applicant. She said Ms. Urry was generally "vocal".

25. Ms. Urry claimed that she raised health and safety concerns with Mr. Stockwell in a face-to-face meeting in August 2002, very shortly after he arrived at Peel. She testified that she told him she had not received proper training, and in particular fire extinguisher training; that she had not received a standard issue rain coat; that there were problems on the buses with rusty mirrors and driver seat adjustment; and that maintenance was slow to respond to the Transhelp Maintenance Request forms completed by the drivers. Ms. Urry testified that Mr. Stockwell was very receptive to her concerns, and grateful for her having made them known to him.

26. The details of this meeting were not put to Mr. Stockwell in the course of his cross-examination. In any event, he did not recall a one-on-one meeting with Ms. Urry. He recalled that he met with a number of part-time drivers on August 2, 2002, to assure them that there would be sufficient work for them to do. He was not sure if Ms. Urry was one of those he met, but in any case, he was quite certain that, if she was, he did not discuss matters of health and safety with her.

27. I prefer Mr. Stockwell's evidence on this point, partly because I find him to be more credible than the applicant, and partly because the kinds of things the applicant says she raised with him are of a kind I would have thought were properly the subject of discussion with Ms. Nicholas, the applicant's direct supervisor at the time. And yet there was no evidence of any interaction between Ms. Urry and Ms. Nicholas concerning such issues. Nor, of course, was there

any evidence of the applicant utilizing her trade union to ensure that she got what she felt she needed in terms of training, rain coats, and prompt maintenance. It is far more probable that Mr. Stockwell wanted to talk to the part-time drivers about their worries concerning lack of work, and that there was no reason to digress into the other issues the applicant claims to have discussed.

28. Ms. Urry claims further that she spoke to Ms. Ayres on November 24 or 25, 2002 regarding rusty bolts on her bus mirrors, and that Ms. Ayres angrily brushed her off. Ms. Ayres denied that such a meeting took place. It is curious that Ms. Urry recollected the date of such a mundane event, and that she felt the need to report the problem in this fashion, when it could have been dealt with in the usual manner, through the submission of a TransHelp Maintenance Request form. But even if the applicant brought the matter to Ms. Ayres' attention, I am not persuaded that it constitutes proof of the applicant raising a particular health and safety concern. It seems to me that Ms. Urry was doing nothing more than what her job required: reporting routine maintenance issues regarding her bus.

29. The applicant said that following her shift on January 19, 2003, she reported to Ms. Nicholas and Ms. Ayres a problem with respect to her two-way radio. I am not certain what the problem was, or how it constituted a health and safety hazard. Again, it seems odd that the applicant would remember the precise date of such an unremarkable event, and that she would report it to two supervisors rather than through the TMR process.

30. Ms. Urry testified that she issued lots of written memoranda to Ms. Ayres, Ms. Nicholas and Mr. Stockwell with respect to health and safety issues. However, she did not produce any copies, or go into the details of these memoranda, and her representative did not put such an assertion to any of the other witnesses.

31. Ms. Urry told the Board that she was verbally reprimanded by Mr. Stockwell in May 2003 for having raised a health and safety concern with a dispatcher. She said Mr. Stockwell criticized her for blaming dispatch for the problems associated with her need to request a replacement bus in the course of her duties. The applicant believes that Mr. Stockwell was upset with her because of her involvement the previous March in a dispute between Ms. Ayres and another employee, Molly Hampton, which is described briefly later in this decision.

32. Mr. Stockwell agreed that he met with Ms. Urry on May 6, 2003. He said that he arranged the meeting because he was concerned about the applicant's behaviour, and her seeming unhappiness in the workplace. Mr. Stockwell's notes indicate that Ms. Urry raised concerns about: a missing day's pay, her entitlement to retroactive pay under the collective agreement, her benefits package, and her uniform. She also was upset about her disabled grandfather, a TransHelp customer, having been charged for a cancelled transit call. There was some discussion about a verbal exchange between the applicant and an employee by the name of Ebanks, which Mr. Ebanks complained entailed rudeness by Ms. Urry. The notes make no reference to matters of health and safety, and Mr. Stockwell was adamant in his testimony that no such issue was discussed. I accept his testimony. Even if there was discussion concerning Ms. Urry's interaction with a dispatcher, I am satisfied that there was no health and safety context to that discussion. At best, Mr. Stockwell was merely expressing concern about the tone and appropriateness of Ms. Urry's comments to a co-worker. In any case, to the extent Ms. Urry believed she was the victim of a reprisal, she never complained to anyone, including CUPE.

33. Ms. Urry said she authored a lot of TransHelp Maintenance Requests, many more than were produced by Peel in the hearing. In fact, as she went along in her testimony, Ms. Urry tended to increasingly emphasize the number of TMR's she said she submitted. My impression is that these claims were self-serving and somewhat exaggerated. However, for purposes of this decision, I am prepared to accept that the applicant routinely and frequently submitted her TMR's to maintenance.

34. Ms. Urry suggested that she never received proper training, including refresher training, and did not receive a safety manual, and that she complained about this to TransHelp management. The specifics of the complaints were never put to Ms. Ayres, Ms. Nicholas or Mr Stockwell in cross-examination. I do not put much weight on the applicant's claims in this regard, and again, there was no evidence she ever sought the union's help to formalize her concerns.

35. Ms. Urry acknowledged in her evidence that every time she refused to operate a malfunctioning bus while en route, and required dispatch to send her a replacement bus, the situation was attended to promptly and without incident.

The applicant's driving/accident record

36. I now turn to Ms. Urry's three accidents in the last year of her employment. On November 27, 2002, she failed to yield to another vehicle while transporting three passengers, one of whom sustained an injury in the ensuing collision. Vehicle damage exceeded $11,000. At the time of the accident, there was no Accident Review Committee in place. However, Ms. Ayres, Ms. Nicholas and Mr. Stockwell investigated and determined the accident was preventable. Together they decided that, given the extensive damage, the personal injury, and the degree of negligence, Ms. Urry deserved a three day suspension, with two of those days on paid training, and the other to be served as an unpaid day from scheduled work. Ms. Nicholas issued a letter to that effect to the applicant. The applicant was also charged by police with failing to yield and convicted for an "unsafe move". According to Ms. Ayres, the training was provided to the applicant, although she could not recall the details. She thought that the training consisted of the applicant being accompanied by either Ms. Ayres or Ms. Nicholas as she drove a bus on a route. Ms. Urry did not file a grievance challenging the discipline.

37. The applicant's second accident occurred on September 18, 2003. She rear-ended another vehicle. Ms. Ayres went out to the scene upon being notified. Perhaps surprisingly, given that the TransHelp bus left skid marks from 12 to 14 feet in length, there was only minimal damage and no personal injury. The Accident Review Committee was by now well established. Ms. Nicholas was one of the members of the ARC at the time. The ARC determined that the accident was preventable. Again, Ms. Ayres, Ms. Nicholas and Mr. Stockwell conferred, and as a result, Ms. Nicholas issued a more severe penalty than the first, a five day suspension, two of which days were to be served in paid training. This letter warned of the possibility of termination in the event of future incidents. Ms. Urry did not challenge the ARC's finding of preventability, and did not use the grievance process to complain about the suspension.

38. Not long after the applicant's second accident, in early October 2003, TransHelp management discovered that Ms. Urry's driver's license was under suspension due to an unpaid speeding ticket issued against her in her personal capacity. Much was made in the course of the

hearing with respect to precisely who at TransHelp or elsewhere initiated the record search that disclosed Ms. Urry's suspended license. The applicant's representative attempted to demonstrate a sort of conspiracy or targeted record search aimed specifically at the applicant. There was, however, no persuasive evidence whatsoever of such a plot. More than likely, based on the evidence as a whole concerning TransHelp's bi-annual random drivers' record search, Ms. Nicholas initiated the search by making the usual request, and the applicant's suspension came to light by sheer coincidence.

39. According to Ms. Ayres and Mr. Stockwell, they were informed of the license suspension on October 2, 2003, when Ms. Urry was on a scheduled day off or on vacation. They did not recall seeing her. Ms. Urry testified that she had been scheduled off that day, but that she nevertheless attended at the TransHelp office around 3:00 p.m. for personal reasons. She recalled speaking to or seeing both Ms. Ayres and Mr. Stockwell, but they said nothing of any license suspension. The applicant's representative attempted to make much of their silence, but even if I accept that Ms. Urry came to the office on the afternoon of October 2, it may well be that her superiors knew nothing of the suspended license at that point in the day. Indeed, Ms. Urry's own testimony concerning the meeting she had with Mr. Stockwell and Ms. Ayres at the commencement of her next scheduled shift on October 6, 2003, bears this out. She testified that they indicated to her they had discovered the license suspension late in the day on October 2.

40. Ms. Urry was not aware of the suspension of her license. She was taken by surprise when advised of it. She took steps immediately to take care of the problem. Still, a suspended license for a bus driver is a serious matter. Ms. Urry received a written warning as a result, on November 25, 2003. According to Ms. Ayres' uncontradicted testimony, the same penalty had been imposed upon a maintenance employee by the name of Yousef when it was discovered that his license was under suspension; and upon a driver by the name of Martinez for failing to maintain her B license. Why it took so long for TransHelp to give Ms. Urry the written warning was not entirely clear, although Ms. Ayres stated, without contradiction, that Ms. Nicholas, the author of the letter, was slow to carry out that sort of task. In any event, nothing turns on the delay. Ms. Urry did not complain about it, nor did she grieve the discipline on the merits.

41. There was another significant development later on November 25, 2003. After receiving her written warning with respect to the suspended license at the beginning of her shift that day, Ms. Urry commenced her driving assignment and later experienced her third accident. Her bus made slight contact with a vehicle directly in front of her. No one was injured, and as it turned out, there was minor damage to the bus bumper. Ms. Urry immediately called dispatch to report the accident, and then disembarked to assess the situation. The driver of the vehicle got out briefly, saw no evidence of any damage, said so, returned to her car, and left the scene. At that point Ms. Urry had not yet recorded the other driver's information, including the license plate number. Gathering that information was required by TransHelp policy. Perhaps she did not have the presence of mind to ask the other driver to remain for the purpose of exchanging information. She was certainly concerned that this was her third accident. In any event, after the other driver pulled away, the applicant panicked and decided to pursue the driver in the hope of at least obtaining a plate number. She did not succeed in doing so. The applicant then proceeded to drop off her last passenger.

42. Ms. Ayres testified that she went out to meet Ms. Urry for the purpose of investigating the accident. She knew Ms. Urry's driving assignment that day, and stated that she caught up

with the applicant at the passenger drop-off area where Ms. Urry was scheduled to discharge a passenger. The applicant admitted leaving the scene of accident, contrary to TransHelp policy, for the purpose of catching up to the other driver. They completed the usual accident reporting paperwork. Ms. Ayres then recalled returning to the yard and explaining what had happened to Ms. Nicholas, Mr. Stockwell and the Administrative Supervisor, Joy Toliao. Ms. Nicholas said, "Yeah, we've got her now". According to Ms. Ayres, Ms. Toliao replied that it was inappropriate to talk about Ms. Urry in the open office. The matter was subsequently referred to the Accident Review Committee, and ultimately to Human Resources and the Commissioner of Social Services.

43. Both Ms. Urry and Ms. Nicholas had a different version of the immediate aftermath of the accident. They testified that Ms. Nicholas, not Ms. Ayres, came out to meet the applicant and investigate. Ms. Nicholas stated that she was in the TransHelp office when Ms. Urry called in the accident, and she admits she said words to the effect that "We've got her now". She went out to meet the applicant in a library parking lot. Ms. Nicholas testified that she questioned Ms. Urry about why she left the scene of the accident, and that afterward they both made their way back to the TransHelp yard in separate vehicles. Ms. Urry, on the other hand, recalled that the two of them first went to the police station to report the accident (a report which, according to Ms. Urry, the police refused to accept), and then traveled back to the yard. During her cross-examination, Ms. Urry was asked to explain why Ms. Nicholas had not mentioned visiting the police station. Ms. Urry stated she was quite sure Ms. Nicholas had mentioned it in her testimony. In fact, as I have earlier pointed out, Ms. Nicholas said nothing of the sort.

Ms. Urry's termination

44. TransHelp suspended Ms. Urry from her duties with pay, pending a review by the Accident Review Committee and a determination by management as to the appropriate disciplinary response. Not unexpectedly, the ARC determined that the accident was preventable.

45. There followed a meeting on December 2, 2003 between the applicant, Mary Killeavy from Human Resources, Ms. Nicholas (she did not recall this meeting) and union representative Enea Baliva. The purpose was to gather further information from Ms. Urry concerning her actions the day of the accident. Ms. Killeavy took minutes of the meeting, and listed all the attendees. She took detailed notes of the questions put to Ms. Urry and her responses. Ms. Urry stated she did not know why the accident occurred, as there had been no physical distractions. She did state on a number of occasions that she had been upset about the meeting earlier in which she was given the written warning. According to Ms. Killeavy's uncontradicted testimony, Ms. Urry raised no issue of health and safety. However, the notes refer to an "ongoing battle" since March 2003. That probably refers to the applicant's perception of tension between Ms. Ayres and Ms. Urry as a result of Ms. Urry's involvement in March in authoring a letter on behalf of a co-worker, Molly Hampton, complaining of a run-in between Ms. Hampton and Ms. Ayres. Ms. Urry was not a witness to the incident, nor was the written complaint characterized as a health and safety concern. Nevertheless, according to the applicant and to Ms. Nicholas, the relationship between Ms. Urry and Ms. Ayres deteriorated from that point forward.

46. Peel terminated the applicant by letter dated December 10, 2003, under the signature of Ms. Nicholas. Ms. Killeavy played a role in drafting the letter for Ms. Nicholas. Cited in the

correspondence were the three preventable accidents, as well as four "letters of instruction" issued against the applicant for: inappropriate comments to a passenger (June 10, 2003); damaging a client's wheelchair (July 24, 2003); failure to fill out the Daily Inspection Reports (July 24, 2003); and exchanging buses with a co-worker without authorization (October 14, 2003).[3] With respect to the third accident, Ms. Nicholas noted a number of policy breaches, namely, failure to obtain contact information from the other driver, failure to immediately notify a supervisor of the accident, failure to inspect the bus immediately after the accident, and moving the bus from the accident scene. Ms. Nicholas concluded by saying that TransHelp had lost confidence in the applicant's ability to safely operate a bus and to provide safe and secure transportation to the passengers.

Events following the applicant's termination

47. The union filed Ms. Urry's grievance the next day with Ms. Nicholas. The grievance alleged a violation of the management rights clause in the collective agreement, and claimed that the termination was without just cause. Ms. Urry did not allege in the grievance that her termination was an unlawful reprisal under the Act.

48. Ms. Urry applied for, and was ultimately successful in obtaining, Employment Insurance benefits. She contended in her testimony that Mary Killeavy attempted to sabotage her claim. There was no evidence to support that contention. Ms. Killeavy was careful in dealing with Human Resources Development Canada (HRDC) in its inquiries about Ms. Urry's claim for benefits. She was aware that CUPE was involved with Ms. Urry's termination, and because she was not certain whether or not the termination was being treated as a resignation, she called Ms. Urry for instructions. The applicant confirmed that HRDC should be informed that she was terminated. Ms. Killeavy acted accordingly. She indicated to HRDC that the applicant had been terminated, but not for wilful misconduct. She said that Ms. Urry's accident record suggested that perhaps she was not suitable for driving, and that Peel was concerned that, as a bus driver, she represented a risk to the public. Nothing Ms. Killeavy said had the slightest negative impact upon the applicant's claim for Employment Insurance benefits.

49. Ms. Urry had similar suspicions about Ms. Killeavy's handling of a job reference from the Red Cross. However, Ms. Killeavy's evidence on this point was uncontradicted. She told the Board that Ms. Nicholas received the request for a reference, and gave that request to her for a response. Ms. Killeavy said she spoke to the applicant about the reference in the same phone call with Ms. Urry concerning the Employment Insurance benefits. Ms. Killlleavy then attempted to get in touch with a Red Cross representative, could not do so directly, and left a message. She received no phone call in response. There was nothing inappropriate on the part of Ms. Killeavy or Peel with respect to the Red Cross reference.

50. Finally, Ms. Urry suggested that Mr. Stockwell was less than cooperative in dealing with a second job reference. She testified that she was told by the reference that Mr. Stockwell did not return telephone calls. There was no direct evidence of that. Furthermore, this issue was

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[3] The union was able to persuade Peel to alter the termination letter of December 10, 2003. A revised letter of termination was issued to Ms. Urry, which deleted all references to the four letters of instruction described above. In my view, nothing in this matter turns on the fact that these deletions were made.

not explored at all with Mr. Stockwell in the course of his cross-examination. Accordingly, I find no evidence of any wrongdoing by Mr. Stockwell or Peel in this regard.

Ms. Urry's record compared to others

51. The applicant contends that when Ms. Urry's driving record and disciplinary record are compared with other employees, it is clear that her termination was a disproportionate response, suggesting that there were undisclosed and unlawful reasons for the termination.

52. The comparisons involved the records of the applicant's supervisor, Ms. Ayres, Eustace Del Sol, the maintenance employee, and Mary Rose Jenner, a fellow bus driver.

53. The most the evidence disclosed about Ms. Ayres is that, when she was a bus driver, she had an accident in 2001 for which no discipline was imposed, and a preventable accident in May 2002 for which she was issued a three-day suspension which she grieved and which was subsequently reduced to a written warning. I note that these accidents occurred in the period preceding Mr. Stockwell's employment, and well before the TransHelp crackdown on accident prevention.

54. Mr. Del Sol was accident prone in early to mid 2002. He was involved in two very minor collisions in April (backing into and bumping a vehicle in the TransHelp yard) and May (backing into and denting a parked vehicle on the road while on a service call), and a third, arguably more serious yard accident about one week before Mr. Stockwell commenced as Manager of TransHelp. For these mishaps, he received, in order, a verbal warning and a written warning from Mr. Stockwell's predecessor, and a suspension of one day, half of which was unpaid, the other half of which was paid training. In his evidence, Mr. Stockwell explained that, in retrospect, perhaps the one day suspension had been somewhat lenient. He said that there were a number of factors at play: Mr. Del Sol was not, like the bus drivers, responsible for transporting members of the public, and his other accidents had occurred well prior to Mr. Stockwell's arrival. In addition, CUPE officials were expressing concerning about an inconsistent management approach to discipline involving accidents. As a new arrival, Mr. Stockwell was not eager to make his initial mark in a heavy handed manner. And so, he erred on the side of lenience in dealing with Mr. Del Sol's third accident.

55. Mr. Del Sol was also disciplined for driving a TransHelp vehicle on a road test on October 25, 2002 when his license had expired. He had to serve a three-day unpaid suspension as a result of this serious infraction, and having regard to his past disciplinary record.

56. Finally, there is Ms. Jenner's record to consider. She was at fault for a minor accident on May 6, 2002, when the bus she was driving rear-ended another vehicle. The circumstances were similar to Ms. Urry's third and final accident, except that, in Ms. Jenner's case, there was no issue of leaving the scene or failing to obtain the other driver's information. Ms. Jenner received a written warning for this infraction, which, upon the filing of a grievance, was reduced to a verbal warning.

57. In July 2003, Ms. Jenner returned her bus to the yard where, upon examination by maintenance, some damage to the bus was discovered. Ms. Jenner did not appear to be aware of the damage when confronted, and could not account for it, although she fully accepted

responsibility. Ms. Nicholas issued a written warning for this infraction. Ms. Jenner did not grieve the warning. Parenthetically, I note that Ms. Urry committed a similar infraction on May 6, 2003, and was not disciplined for it, although she did receive a letter of instruction in connection therewith for failing to complete her circle checks.

58. On September 23, 2003, Ms. Jenner was involved in a very serious, preventable accident with another vehicle. The accident took place in an area, according to Ms. Nicholas, where many such accidents occurred previously. Visibility at the intersection was partially restricted. The bus Ms. Jenner was operating entered the intersection and was immediately hit squarely and heavily on the passenger side near the passenger ramp. The bus required about $40,000 in repairs. There was also about $10,000 damage to a nearby residence into which the bus smashed. By sheer fortune it seems, no one sustained any significant injury.

59. In response to the accident, Ms. Nicholas issued to Ms. Jenner a three day suspension, one of which was unpaid, the other two of which were paid training. In her cross-examination Ms. Nicholas said for the first time in her testimony that she did not agree with the discipline when it was discussed with Ms. Ayres and Mr. Stockwell, and that, in fact, she argued for Ms. Jenner's termination. That suggestion was somewhat contradictory to what she said in chief, and in any case, was never put to Ms. Ayres or Mr. Stockwell during their respective cross-examinations. They testified that the decision to suspend Ms. Jenner, like all the others, was the consensus reached by all three of them, and they were not challenged seriously under cross-examination on that point. I doubt that Ms. Nicholas would have signed a letter with which she fundamentally disagreed. I therefore put no weight on Ms. Nicholas's assertion that she voiced any concerns about the disciplinary treatment of Ms. Jenner.

60. I have set out only Ms. Jenner's preventable accident record. She was involved in a number of other accidents in which she was not at fault. There is no need to describe those.

Analysis and Conclusions

The relevant statutory provisions

61. The provisions of section 50 of the Act relevant to this matter read as follows:

> **50.** (1) No employer or person acting on behalf of an employer shall,
>
> (a) dismiss or threaten to dismiss a worker;
>
> (b) discipline or suspend or threaten to discipline or suspend a worker;
>
> (c) impose any penalty upon a worker; or
>
> (d) intimidate or coerce a worker,
>
> because the worker has acted in compliance with this Act or the regulations or an order made hereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the

> enforcement of this Act or the regulations or in an inquest under the *Coroners Act*.
>
> (2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Board in which case any rules governing the practice and procedure of the Board apply with all necessary modifications to the complaint.
>
> ...
>
> (5) On an inquiry by the Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.
>
> ...
>
> (7) Where on an inquiry by the Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.
>
> ...

62. The combined effect of these provisions is that, for the Board to find that there was a reprisal in this matter, it must be satisfied that the applicant was engaged in the exercise of her statutory rights, and that the exercise of those rights was a motivating factor, no matter how small, for Peel's decision to terminate her employment. The onus is on Peel to demonstrate that it was not unlawfully motivated. Even if the Board is not persuaded that there was a reprisal in contravention of subsection 50(1), nevertheless, there is a discretion under subsection 50(7) to substitute a lesser penalty than termination, if the Board is satisfied that it is appropriate to do so in all the circumstances.

Did the applicant raise issues of health and safety?

63. Ms. Urry argues that whenever she completed a TransHelp Maintenance Report, or found a problem during a circle check, or asked for a change of bus due to this or that malfunction she was raising matters of health and safety. But so too were the other drivers. It was normal for all of them to experience the occasional maintenance problem in the course of their driving duties. For the most part, they reported these issues via the TransHelp Maintenance Requests described in paragraph 15 above, which were generally seen by maintenance personnel only, or the drivers called dispatch and arranged for delivery of a replacement bus. The TransHelp management were not made aware of these issues unless there were extraordinary circumstances.

64. Was Ms. Urry more vocal in matters of health and safety than other drivers? There was no compelling evidence to suggest it. None of the minutes of the joint health and safety committee reflect any complaints raised by Ms. Urry. Ms. Nicholas said the applicant was quite "vocal", but she did not go so far as to suggest that she was particularly concerned with health and safety issues. As far as Ms. Nicholas was concerned, the catalyst for the applicant's conflict with management was the incident between Ms. Ayres and Ms. Hampton, which I have found had nothing to do with health and safety.

65. Ms. Urry, on the other hand, was quite insistent that she did raise health and safety concerns directly with the management, but her evidence as to the circumstances was vague and not particularly persuasive. Ms. Ayres and Mr. Stockwell were both adamant that they were never aware of any particular health and safety concerns raised by the applicant, and for reasons that I have set out earlier, I prefer their evidence over that of the applicant.

66. To the extent the applicant raised any health and safety issues, it was in the same manner as the other drivers. That is, the issues were communicated to dispatchers or to maintenance through various modes of communication, and not directly to the management. The people who decided to terminate Ms. Urry were not made aware by the applicant of any particular health and safety concerns on her part.

Was the applicant's termination a disproportionate response from which it might be inferred that she was the victim of an unlawful reprisal?

67. Simply put, the answer is no. The primary reason is that all of Ms. Urry's accidents occurred in the new era of accident prevention and progressive discipline introduced by Mr. Stockwell. That was not the case with Ms. Ayres, Mr. Del Sol or even Ms. Jenner.

68. Both of Ms. Ayres' accidents occurred prior to Mr. Stockwell's arrival. The one in 2001 did not give rise to any discipline at all.

69. For all intents and purposes, all of Mr. Del Sol's three accidents occurred under the old regime. However, Mr. Stockwell dealt with the last one, and imposed a one-day suspension, but at a time when he had barely been on the job. On top of that, Mr. Del Sol was a maintenance employee. His primary function was not to drive but to fix things. He had no responsibility, like Ms. Urry, for the safe transport of vulnerable members of the public.

70. Driving without a valid license was a serious matter, even for Mr. Del Sol. For that he received a full three-day suspension. That seems to have been appropriate in all the circumstances. Ms. Urry did not drive a TransHelp bus without a valid license, although she likely would have had TransHelp not inadvertently discovered her suspended license. In any case, she received only a written warning. That too seems to have been a sensible outcome.

71. Ms. Jenner's record, at first blush, comes closest in comparison to the applicant's. However, her first accident occurred well before Mr. Stockwell took over. Moreover, she grieved the written warning issued in respect of that accident, and reduced the penalty to a verbal warning. That laid the disciplinary basis for what followed later.

72. Ms. Jenner's second mishap occurred more than a year later, this time during Mr. Stockwell's watch. It involved minor damage whose cause was never determined. She received only a written warning.

73. The third accident, in September 2003, was admittedly more serious in terms of property damage than any of those caused by Ms. Urry. It might even have been the worst TransHelp accident ever. But at that point, Ms. Jenner's record consisted of one written warning, together with one verbal warning issued sixteen months earlier during a period when TransHelp's approach to accidents was more lenient. Ms. Urry, on the other hand, had been involved in three preventable accidents inside the span of one year, and all of them in an era of heightened safety awareness.

74. While it might have been open to TransHelp to terminate Ms. Jenner, the fact that it did not do so, but rather, issued a three-day suspension, was the more prudent course, and is understandable in all the circumstances.

75. I find no evidence that Ms. Urry was treated more harshly than her co-workers in all the circumstances. I am therefore satisfied that Peel has discharged the burden of proof in this matter. I find that there was no reprisal made against Ms. Urry.

Should I exercise my discretion under subsection 50(7) of the Act, and substitute a lesser penalty than termination?

76. Despite my finding that Peel did not commit an unlawful reprisal against the applicant, it is, nevertheless, arguably open to me to substitute the termination for a lesser penalty if I believe that to be appropriate in all the circumstances. The applicant contends that I ought to consider, among other unspecified remedies, reinstatement.

77. To the extent I have jurisdiction under subsection 50(7), I do not think this is a case to second guess the employer's decision to terminate the applicant, for the following reasons.

78. First, the decision to terminate was not entered into lightly. TransHelp investigated the matter thoroughly, including an interview with the applicant on December 2, 2003 at which she was given full opportunity to explain her actions during the third accident.

79. Secondly, TransHelp has an obviously legitimate interest in maintaining strict adherence by bus drivers to the highest levels of safety. It took several significant steps toward that objective when Mr. Stockwell took over as the Manager. New procedures were introduced. Training was provided to the workforce. Ms. Urry was not treated unfairly or harshly under the new rules. She simply happened to be among the first of the drivers to face the most serious consequences of repeated failures to comply. She in fact knew that her third accident was extremely significant, otherwise she would not have chased after the other vehicle in defiance of clearly established TransHelp policy.

80. Thirdly, despite Ms. Urry's assurances that she would have no problem working with a number of people who were in authority at the time of her termination, I am not so certain that they share that view. This litigation often involved quite personal attacks by the applicant or her representative on a number of the TransHelp management, usually concerning matters that had

no, or next to no, relevance to the issues in dispute. I do not think it will be a "business as usual" situation should Ms. Urry return to the workplace.

81. Fourthly, there is the issue of delay in bringing this application. As I indicated in my decision of September 30, 2005, I decided not to dismiss the application on a preliminary basis because of a largely unexplained delay of close to one year with respect to its filing. I deferred consideration of the issue. It is appropriate to deal with it in the context of the exercise of discretion under subsection 50(7). It is another factor that militates against substitution of the penalty of dismissal. Allegations of serious misconduct ought to be made at the earliest possible point in time, and if not, there ought to be a reasonable explanation for the delay. The applicant did not advance such a reason, nor did the applicant address any health and safety issues in her grievance challenging her dismissal or any of the discipline which preceded it. I am therefore left to surmise that the applicant's claim of unlawful reprisal was something of an after thought, and that this application is really a standard labour relations matter dressed up as a health and safety complaint.

82. Although it was not argued by any party, there is an issue as to whether or not, in the circumstances of this case I have discretion under subsection 50(7) of the Act. That is because the collective agreement applicable to the applicant appears to contain a specific penalty of discharge for "non-adherence to safe vehicle operating practices" (Article 11.03). However, since I have set out a number of reasons why I would not have exercised such a discretion in favour of the applicant in any event, it is unnecessary to decide whether or not Article 11.03 bars the exercise of that discretion.

83. For all these reasons, I decline to exercise my discretion to substitute a lesser penalty for the termination.

84. The application is dismissed.

2049-03-U et al Universal Workers Union, Labourers' International Union of North America, Local 183, Applicant v. Labourers' International Union of North America, Responding Party v. Masonry Contractors' Association of Toronto; Toronto Residential Construction Labour Bureau; Metropolitan Toronto Apartment Builders Association; Ontario Concrete & Drain Contractors' Association; The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto and Vicinity Inc.; The Ontario Formwork Association; Pipeline Contractors Association; The Utility Contractors' Association of Ontario; Metropolitan Toronto Road Builders' Association; The Heavy Construction Association of Toronto; Greater Toronto Sewer and Watermain Contractors Association, Residential Framing Contractors' Association of Metropolitan Toronto and Vicinity; Labourers International Union of North America, Ontario Provincial District Council; Labourers' International Union of North America, Local 506; Labourers' International Union of North America, Local 527; Labourers' International Union of North America, Local 837, Labourers' International Union of North America, Local 1089, Labourers' International Union of North America, Local 1059, Labourers'

International Union of North America, Local 1036, Labourers' International Union of North America, Local 625, Labourers' International Union of North America, Local 607, Labourers' International Union of North America, Local 247, Labourers' International Union of North America, Local 493, Jurisdictional Committee of Universal Workers LIUNA Local 183 and the Group of 47 nominated delegates, Tony Dionisio, John Dias, Intervenors.

Construction Industry – Trusteeship – The Board issued reasons to support its finding of June 12, 2006 that LIUNA properly exerted its rights to impose trusteeship over Local 183, without violating either s. 147 or 149 of the Act – The Board examined the myriad proceedings and events leading up to the imposition of the trusteeship, including the hearing before and determination of the union-appointed Canadian Independent Hearings Officer (the Keller Award) – The Board found that LIUNA had not in any way altered the jurisdiction of 183 in breach of s. 147 – For purposes of s. 149, the Board looked at the Keller Award as well as the materials presented and arguments made before the Board, and held that the three preconditions for issue estoppel (as argued by LIUNA) had been met – The Board specifically refused to rely on supplementary affidavit material filed before it, stating that that evidence could have been presented to Keller but was not – The Board found that it is inconsistent with the core values of both parent and local to expend union funds for surreptitious surveillance to preserve the positions of those in power, or to approve the forgery of collective agreements – Issue estoppel applied – Trusteeship confirmed

BEFORE: *Norm Jesin*, Vice-Chair.

APPEARANCES: *Brian Shell* appearing for Local 183 and its members; *Gary Caroline, Robert Gibson, Ben Barnes* and *Dan Randazzo* appearing for LIUNA; *Jordan Winch* appearing for Greater Toronto Sewer and Watermain Contractors Association; *Erin R. Kuzz* appearing on behalf of Residential Framing Association of Metropolitan Toronto & Vicinity; *C. E. Humphrey* appearing for Masonry Contractors' Association of Toronto Inc. Toronto Residential Construction Labour Bureau; *Christopher M. Little* appearing for Metropolitan Toronto Apartment Builders Association, Ontario Concrete & Drain Contractors' Association, The Residential Low-Rise forming Contractors' Association of Metropolitan Toronto and Vicinity, The Ontario Formwork Association; *Joseph Liberman* appearing for Metropolitan Toronto Road Builders' Association and The Heavy Construction Association of Toronto.

DECISION OF THE BOARD: January 26, 2007

1. On June 12, 2006, the Board issued the following decision in these matters:

> 1. Having regard to the materials filed, the representations of the parties, and the very apparent need for expedition in these matters, the Board provides the following "bottom line" decision. Reasons will follow.
>
> **Section 147**

2. The Board finds that LIUNA has not breached the provisions of section 147 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). The complaint by Local 183 pursuant to section 147 of the Act is dismissed.

Section 149

3. LIUNA has established just cause to place Local 183 under trusteeship in accordance with section 149 of the Act.

4. In the circumstances, the Board finds that it is appropriate to exercise its discretion to make orders and directions to the parties, pursuant to subsection 149(4) of the Act.

5. The Board remains seized to deal with any difficulties which may arise in the implementation of this decision and to make such variations to this decision as circumstances may require. Particularly, the Board remains seized to make any further directions and/or remedial orders in the exercise of its discretion under subsection 149(4) of the Act.
Order

6. Pursuant to the Board's discretion under subsection 149(4) of the Act, the Board Orders and Directs:

(a) All officers and staff of Local 183 are directed to immediately take such action as is necessary to transfer control and authority of the assets of Local 183 to the appointed trustees in accordance with their lawful instructions;

(b) No action shall be taken by LIUNA to suspend or expel any of the present officers and/or staff of Local 183 from membership in Local 183 and LIUNA without leave of the Board;

(c) Within one month from the date of this order LIUNA shall file with the Board a plan, with timetables, for lifting the trusteeship and restoring Local 183 to the control of its members. LIUNA shall take steps to ensure that the members of Local 183 are informed of the details of that plan. In that regard LIUNA shall file with the plan, an account of the steps it has taken or intends to take to inform the members of the details of the plan;

(d) LIUNA shall ensure that any member of Local 183 who has been nominated as a delegate to the upcoming LIUNA convention, shall be entitled to exercise the full rights accorded to any such nominated delegate under the LIUNA constitution, provided that the credentials of said delegate have not been challenged, or provided that any such challenge has been rejected by the independent officer responsible for considering such challenge;

(e) LIUNA shall inform the Board within 3 days of any decision by an independent election officer upholding the challenge of the credentials of any delegate from Local 183 to the upcoming LIUNA convention.

> LIUNA shall at the same time inform the Board of any plan to replace such delegate.

These are the reasons in support of that decision.

Introduction

2. Board File No. 0221-6-U is an application by Universal Workers Union, Labourers' International Union of North America, Local 183 (hereinafter, "Local 183") alleging that its parent, Labourers' International Union of North America (hereinafter "LIUNA") had purported to place Local 183 into trusteeship without just cause, contrary to ss. 147(1) and 149(1) of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). The other files consist of a series of applications and cross-applications relating to the series of events leading up to and following the ultimate decision by LIUNA to place Local 183 into trusteeship.

3. A consultation was scheduled to deal with these matters on June 7, 2006. After the filing of the application in Board File No. 0221-06-U, it became apparent that many of the matters raised by the earlier applications were overtaken by events and might not have to be specifically dealt with. Rather, the crucial matters to be determined in this consultation were whether there was just cause for the imposition of the trusteeship and, in any event, what relief should be granted. Nevertheless, it was also clear from the outset that all of the facts pleaded in all of these applications were arguably relevant to the issues to be determined. The files were therefore listed together and I directed that the parties could rely on all the facts pleaded in all these files in the presentation of their case.

4. The matters in dispute between the parties, as reflected by the pleadings in the various files (and as will be more particularly described below) had occupied the time, effort and expense of the parties for a number of years. It became apparent that with the decision to place Local 183 into trusteeship and the formal challenge to that trusteeship before the Board, that the parties desired to reach a determination of the dispute in a relatively efficient manner which at the same time afforded all parties with the opportunity to present all of the evidence and argument that they needed to rely on. The following procedure was therefore established.

5. The parties were offered an opportunity to submit such documentary evidence as they desired, either by affidavit, declaration, or in such form as they deemed appropriate. They were offered a further opportunity to cross-examine opposing witnesses who filed affidavits or declarations. Although such further evidence was submitted and relied on, no party deemed it necessary to conduct cross-examinations of any witnesses.

6. After all the evidence was submitted the parties filed factums of up to thirty pages setting out their submissions of fact and law. They were then given an opportunity to present their submissions orally at the consultation of June 7, 2006. Having regard to the evidence and submissions before me, I issued a decision on June 12, 2006, dismissing the application under s. 147 of the Act on the ground that the imposition of trusteeship in the circumstances before me did not constitute an "alteration of jurisdiction" within the meaning of that section. I also determined that there was just cause, as required by s. 149(1) of the Act, for the imposition of trusteeship Local 183. However, I also determined that it was appropriate to set certain conditions for the imposition of that trusteeship. Those conditions are set out in the original decision.

7. As an aside, it is my view that all counsel, particularly those for the main protagonists, LIUNA and Local 183, should be commended for the way they presented their positions in this case. The stakes in this case were clearly enormous for both sides. The evidence that had accumulated over the last few years was voluminous and the time afforded to organize and present this case in an organized and coherent fashion was relatively short. Yet the parties and their counsel were indeed able to organize their evidence and submissions in a clear, organized and extremely thorough fashion. I am indebted to counsel for their efforts in this case.

The Parties

8. As can be seen from the title of proceedings in these matters, there are many parties who have been named or have chosen to intervene. However, many of the parties that participated did so in a peripheral way, primarily to ensure that their interests were not adversely affected and not to take a position either in support or in opposition to the relief sought.

9. Of course, Local 183 is a party to the proceedings. Local 183 is a large multi-faceted construction local representing over thirty thousand workers in virtually every aspect of the construction industry in Ontario. Naturally, Local 183 took a very active role in these proceedings and it is a named applicant in most of the applications. It should be noted however that the necessary consequence of this litigation was to determine who would be in control of Local 183 in the immediate future – either the elected leadership of Local 183, or its parent international union – LIUNA. Thus the real protagonists of this litigation were the leadership of Local 183 on the one hand, and LIUNA on the other. That is why certain individuals from the local leadership, such as Tony Dionisio and John Dias, have been named as parties in their own right and why they have continued to challenge this trusteeship well after the decision of June 12, 2006. (For more on this point see the decision of November 2, 2006 in these matters.)

10. Once it was determined in the June 12, 2006 decision that the trusteeship would be implemented and that control of the local would be transferred from the executive of the local to the LIUNA appointed trustee, Local 183 formally changed its position in the ongoing litigation from opposing LIUNA to supporting LIUNA. Messrs. Dionisio and Dias continue to oppose LIUNA and continue to seek rescission of the trusteeship. They also seek an order directing LIUNA to hold elections amongst the membership of Local 183 to elect a new executive for the local. For the purpose of these reasons I will refer to Local 183 and its various positions in this case as they were prior to the implementation of the trusteeship – that is, in opposition to LIUNA.

11. The various employer associations that have intervened have done so to protect their interests. They have not taken a position either in support of or in opposition to the various applications. However they have generally asserted that their primary interest was to promote and advocate for continuing stability in the collective bargaining relationship between themselves and Local 183.

12. Other affiliated locals of LIUNA are listed as parties in some of the earlier proceedings. However, they did not appear in the proceedings before me and took no position in Board File No 0221-06-U or in any of the subsequent applications.

Proceedings and Events Leading up to the Imposition of Trusteeship

13. Local 183 asserts that the history of relevant events begins in the latter half of the 1990's and coincides with the appointment of Joseph Mancinelli as the LIUNA Vice-President for the Central and Eastern Canada Region. Local 183 asserts that the continued growth of Local 183 presented an obstacle to Mancinelli's control of LIUNA in Canada and that Mancinelli's actions over the years are reflective of an attempt to reduce Local 183's influence and maintain his own.

14. The litigation history in this case begins with Board File No. 2049-03-U. That was an application by Local 183 alleging that LIUNA was in violation of ss. 147(1) and 149(1) of the Act in that LIUNA was attempting to interfere with the autonomy of the local and to alter its jurisdiction without just cause. The basis of the application stemmed from attempt by LIUNA to investigate what Local 183 refers to as a "plethora of charges" filed against Local 183, its employees, members and executive board. Those charges included charges by other locals that Local 183 was attempting to organize employers within the jurisdiction of those other Locals.

15. It was the view of Local 183 that under its Constitution any charges should first be investigated by an office referred to as the General Executive Board Counsel for Canada (hereinafter the "GEBCC") and then referred to a Canadian Independent Hearings Officer (hereinafter a "CIHO"). Instead, however, the charges were referred to investigation by Vice-President Hammond. In his report Vice-President Hammond recommended that no action be taken in respect of many of the charges under investigation. However, he did recommend that some charges proceed to a hearings panel. He also made recommendations for the establishment of a hearings panel to review general matters pertaining to the operation of locals generally and Local 183 in particular.

16. After receiving the Hammond report, General President O'Sullivan then referred the charges to a hearings panel made up of LIUNA vice presidents. It is this referral that prompted the filing of the application in Board File No. 2049-03-U. In addition Local 183 filed an application for an interim order to delay the hearings panel proceedings. (Board File No. 2320-03-U). Local 183 was concerned that the hearings panel was established in violation of procedures set forth in the LIUNA constitution. Local 183 was also concerned that the referral was too broad and did not take into account those parts of the Hammond Report favourable to Local 183.

17. On November 20, 2003 the Board issued an interim order suspending the deliberations of the hearings panel on an indefinite basis. That order was lifted by decision dated June 23, 2004. However, ongoing events made it unnecessary to convene the hearing panel and it has not been scheduled to convene as of this date.

18. After the Board's order suspending the hearings panel, the GEBCC began to investigate some of the charges filed against Local 183. The GEBCC is a person appointed under LIUNA's Canadian Ethical Practices Code, which forms part of the LIUNA constitution. Under that code, the GEBCC is to operate independently from LIUNA to investigate corruption and activities of officials of LIUNA affiliates which may violate the Code.

19. In early 2004, it became apparent that the GEBCC was investigating activities of Local 183 and its officials that were broader than those alleged in the pre-existing charges. Indeed, on March 9, 2004, investigators retained by the GEBCC arrived at the offices of Local 183 to seize what Local 183 described as "thousands of records and documents, computer mirror hard drives of all membership and financial information form approximately 1998 until 2004". Ultimately, an agreement was reached between Local 183 and the GEBCC by which the materials were handed over to the GEBCC on condition that the information not be shared with officials of LIUNA other than the staff of the GEBCC. The GEBCC investigation of Local 183 continued throughout 2004. In addition to demanding information, the GEBCC investigators visited and questioned Local 183 members about various local practices. The applications in Board File Nos. 1599-04-U and 1598-04-M were filed by Local 183 in an attempt to stop the continuing investigation by the GEBCC.

20. In any event the GEBCC investigation continued and ended with the issuance of a report of the investigation on or about December 1, 2004. In the report the GEBCC outlined 16 findings that he had made that, in his view, were consistent with alleged constitutional violations by Local 183. Those findings were described under the following headings:

1. Exploitation of Undocumented Workers
2. Failure to enforce Collective Agreements
3. Denial of Benefits
4. Excessive Pension Credits
5. Failing to Credit Benefit Entitlements
6. Inadequate Financial Controls
7. Unapproved Donations
8. Improper Expenditures
9. Forgery of Collective Bargaining Agreements
10. Fraudulent Claim of Past Service Credits
11. Failing to Make Per Capita Payments
12. Failing to Remit to the OPDC
13. Failure to Remit Pension Contributions
14. Discrimination Against Contractors
15. Misleading the LIUNA Auditor
16. Obstruction of the GEBCC Investigation

21. On or about December, 6, 2004, LIUNA purported to place Local 183 into emergency trusteeship. Board File Nos. 2651-04-M and 3044-04-M dealt with requests by Local 183 to stop the GEBCC process and to prohibit any imposition of trusteeship by LIUNA as a result of the GEBCC process without the review of any such proposed action by a CIHO. Ultimately no relief was necessary as Brian Keller was appointed as CIHO and it was agreed that he would review the matter in its entirety and determine whether the trusteeship could be imposed. It was agreed that LIUNA would take no steps to implement any trusteeship until after a decision on the matter from Mr. Keller.

22. During this time there were a number of other ongoing events which were reflective of the deteriorating relationship between the leadership of Local 183 and LIUNA and its representatives. For example, Local 183 asserts that in 2004, Mr. Mancinelli initiated litigation against Local 183, its benefit trust fund and Mr. Dionisio on behalf of a fund known as the "Tri - Fund". The litigation was initiated because Local 183 had allegedly failed to pay its appropriate share into the Tri-Fund. Local 183 asserts that it refused to pay into the fund because it was

unable to obtain sufficient information regarding the activities of the fund. It also expressed concern over alleged corruption by officials of the fund.

23. Indeed, in 2004, Local 183 conducted surreptitious surveillance of some of its own representatives to determine the extent of contact between its own representatives and officials of LIUNA, including the administrator of the Tri-Fund. As a result of that surveillance, two representatives were terminated for refusing to acknowledge that meetings had taken place between those representatives and LIUNA officials. However, the representatives were reinstated after the intervention of the GEBCC and by direction of LIUNA. As will be described below, this matter was dealt with in more detail in the inquiry conducted by Mr. Keller.

24. There were also ongoing allegations by LIUNA of improprieties by Mr. Dionisio in his role of trustee of the LIUNA Pension Fund for Central and Eastern Canada. Ultimately, Mr. Dionisio was removed from his position of trustee of that fund.

The Proceedings before Mr. Keller and Mr. Keller's Decision

25. The proceedings before Mr. Keller were conducted in accordance with that part of the LIUNA constitution referred to as the Canadian Ethical Practices Code. The matter was placed before Mr. Keller as an application by LIUNA for the imposition of trusteeship. As Mr. Keller notes at p. 4 of his decision (attached as Appendix "A" herein) the parties attorned to his jurisdiction to hear and determine the matter. Mr. Keller also notes at p. 5 of his decision that because of the legislative framework in Ontario, and particularly s. 149 of the Act, the parties agreed that the test to be applied in the case was one of just cause. Mr. Keller stated that "I accept that I am using the same test, as applied by the Ontario Labour Relations Board (OLRB) as if this was an application under s. 149 of the Act." In other words, the agreement of the parties as reflected in Mr. Keller's award, was that if the GEBCC could establish just cause for the imposition of trusteeship, the application would be granted. If the GEBCC could not establish just cause, the application would fail.

26. Early in the proceedings Mr. Keller became concerned with the length of time it would take to hear evidence with respect to all of the charges before him. In an effort to expedite the matter, and with consent of the parties, he issued an order to manage the time that witnesses would be examined. He also determined that he did not require evidence regarding six of the charges against Local 183.

27. Mr. Keller did hear evidence over many days of hearing relating to the remaining ten charges. The parties were given an opportunity to examine and cross-examine witnesses and to submit documentary evidence. Ultimately, Mr. Keller found that the evidence relating to a number of the charges did not establish just cause for the imposition of trusteeship, either because the charges could not be proven or because the charges themselves did not give rise to a conclusion of just cause. However, Mr. Keller did find that there was evidence in support of four of the charges sufficient to justify the imposition of trusteeship. That finding was made in respect of the charges pertaining to enforcement of collective agreements, failure to credit benefit entitlements, improper expenditures and forgery of collective agreements.

28. In his decision Mr. Keller dealt with the charges pertaining to enforcement of collective agreements and failure to credit benefit entitlements together. The problem addressed by these charges arose from the alleged failure of Local 183 to adequately ensure that

pieceworkers working under various collective agreements were properly credited for their work so that the pieceworkers received the appropriate benefit entitlement.

29. Mr. Keller's description of the problem may be summarized as follows:

> A pieceworker obtains work from an owner or contractor. Typically, the pieceworker hires additional workers to assist in the performance of that work. It is the normal practice that the pieceworker submits one invoice to the owner or main contractor for all the work performed by the entire crew. It is up to the pieceworker that has submitted the invoice to ensure that all the workers in the crew are properly paid and that their work is properly credited for the benefits they are entitled to receive under the collective agreements. Upon receipt of the invoices, the main contractor or owner (as the case may be) would make benefit remittances to a third party administrator, which in turn allocates them to workers listed on the invoice. If the pieceworker does not properly credit the workers on the crew when completing the invoice, those workers would not receive the appropriate level of benefit entitlement.

30. Mr. Keller found that Local 183 had not historically policed these invoices to ensure that the collective agreements are properly applied to all workers. He had heard evidence of a review of the Local's practices in this regard which was initiated by the Local and conducted by a forensic accountant named Ken Froese. Mr. Froese had made two alternative recommendations to the Local in December, 2004. The first recommendation was that the responsibility for pieceworker accounting be removed from the third party administrator and transferred directly to Local 183. The second and alternative recommendation was that Local 183 renegotiate its arrangement with the third party administrator so that Local 183 retain a clearly defined role in overseeing the accounting respecting pieceworkers, including an auditing role.

31. Although the Local informed Mr. Keller that it accepted Mr. Froese's second recommendation, Mr. Froese's evidence was that no such arrangement had yet been negotiated between Local 183 and the third party administrator. Instead, Mr. Keller found that the Local had abrogated its responsibility in this area to the jointly trusteed benefit trust fund to which the benefits are remitted. Mr. Keller found this particularly problematic because on the evidence, Local 183 had no authority or control over the actions of the trustees of the fund. Furthermore, the fund was partially under the control of employer appointed trustees.

32. As a result of Local 183's failure to adopt either of Mr. Froese's recommendations, and its consequent failure to ensure that all workers receive the appropriate benefit entitlements in accordance with collective agreements, Mr. Keller determined that Local 183 was in breach of its constitutional obligations toward its members, including its obligation to protect the welfare and interest of its members. (See Keller award, pp. 27 and 28.) Mr. Keller also determined at p. 29 of his award, that this breach constituted just cause for the imposition of trusteeship.

33. The second charge upheld by Mr. Keller pertained to improper expenditures by the Local to conduct surreptitious surveillance of a member of the Local and five business representatives employed by the Local. The surveillance was conducted in the context of the deteriorating relationship between Local 183 and LIUNA described above including the ongoing

litigation in 2004 between LIUNA and Local 183 regarding the Local's failure to contribute to the Tri–Fund.

34. The surveillance began when Local 183 commenced observation and filming of an official of the Tri–Fund for various reasons which Mr. Keller found to be legitimate. One of the ostensible reasons for that surveillance was to investigate a suspicion that that official was involved with organized crime figures. Ultimately, that surveillance did not lead to any action in respect of that individual. However, after discovering that four of its representatives and a potentially dissident member had met with that official, Local 183 initiated surveillance of those individuals and one other representative employed by the Local. Over a period of a few months commencing in or around April, 2004, Local 183 expended approximately $130,000.00 to conduct intensive surveillance of these individuals.

35. The ostensible purpose of the surveillance was to determine the extent, if any, of contact between these individuals and organized crime figures. However, Mr. Keller found at p. 42 of his award that the real reason for such surveillance was to determine the extent of contact between these individuals and representatives of LIUNA. (In the case of the member at issue, Mr. Keller found that Local 183 was particularly interested in the role that member might play in a Local nomination process taking place around that time.) At pp. 42-43, Mr. Keller further stated that "The expenditure of the funds was directed to the preservation of the leadership of the Local, and not to the direct benefit of any member of the Local."

36. Mr. Keller noted at p. 46 of his award that the individuals in question had the democratic and constitutional right to meet with representatives of LIUNA and to participate fully in all LIUNA affairs in accordance with Article 1 of LIUNA's *Canadian Ethical Practices Code*. He further found at p. 47 that the surveillance in question was "directly contrary to the basic fundamental tenets of the Union as expressed in Article 1 …" As a result Mr. Keller concluded at p. 48-49 that these expenditures justified the imposition of trusteeship.

37. The final charge upheld by Mr. Keller pertained to the forgery of collective agreements. Mr. Keller received evidence from Jamie Melo, a Local 183 Business representative, that he was instructed to forge the employer signatures on collective agreements with five contractors engaged in trim installation in high rise residential construction. Mr. Melo testified that he was instructed to forge the agreements by the Local 183 Sector Coordinator for the high rise residential sector (who also happened to be the Assistant Business Manager for the Local). He gave evidence of a meeting between himself, the Sector Coordinator and Tony Dionisio, the Business Manager of Local 183. That evidence led Mr. Keller to conclude at p. 55 of his award that the forgeries took place at the instigation of the Sector Coordinator with the knowledge of Mr. Dionisio. In reaching that conclusion Mr. Keller placed heavy reliance on the fact that Mr. Dionisio was not called to testify on this matter.

38. The forged agreements were to be submitted in evidence at arbitration between the Local and the Metropolitan Toronto Apartment Builders' Association (hereinafter the "MTABA"). Under the agreement between Local 183 and the MTABA, Local 183 could assert subcontracting protection for trim installation if it could prove it was in contractual relations with 75% of the employers employing 75% of the employees performing trim installation in high rise residential construction. This was the issue that was the subject of the arbitration. The forged

agreements were ultimately not put before the arbitrator. However, one of the agreements was produced at an unrelated hearing at which the owner identified the agreement as a forgery.

39. At p. 55 of the award Mr. Keller based his justification for trusteeship under this charge in the following terms:

> I do not believe that one needs to belabour the point about whether there is just cause for trusteeship under this finding. Nothing could be more egregious than a breach of this type. It fundamentally upsets the trust that is inherent in any labour management relationship, the trust that is required if the Local is to successfully represent its members, advocate on their behalf, and sign and enter into advantageous collective agreements. It is not hard to imagine the damage that has been caused by this act, and how difficult it will be for the Local to regain the trust and cooperation it needs with the employers with whom it does business. There is just cause for Trusteeship under this Finding.

Materials Filed To Rebut the Keller Award

40. The Keller award was released on April 20, 2006. LIUNA almost immediately announced its intention to place Local 183 under trusteeship. That gave rise to the complaint which was the subject of Board File No. 0221-06-U and the scheduling of the consultation to determine all of these matters on June 7, 2006.

41. It was immediately apparent that LIUNA intended to rely heavily on the Keller award in support of its effort to justify the imposition of trusteeship before the Board. Not surprisingly, therefore Local 183 filed a number of affidavits with the Board for the purpose of refuting many of Mr. Keller's findings.

42. A number of affidavits were filed to deal with the findings concerning the enforcement of collective agreements and the failure to monitor and enforce benefit contribution. Those included affidavits by Ken Froese, the forensic accountant engaged by Local 183 to review its procedures, Jorge Vala, Assistant Business Manager of Local 183 and Grace Lau, a senior consultant at Mr. Froese's firm. Mr. Froese and Mr. Vala both asserted that Mr. Keller's award reflected a misunderstanding of the process of remitting benefits for pieceworker crews. For example, Mr. Vala explained that invoices are not supposed to reflect the number of hours for each individual on a crew. Rather, they reflect the total work performed by the crew. He stated that invoices are important as they do form the basis for benefit contributions. However, he stated that benefits are equally apportioned to all individuals listed on the invoice.

43. In his affidavit, Mr. Froese stated Mr. Keller was correct in noting that by the time of the proceedings before him, Local 183 had not yet entered into a formal written agreement to give it responsibility for oversight of remittances, as he had recommended in his report. However, Mr. Froese stated that by that time, Local 183 had essentially entered into a working arrangement with the benefit administrator and the trust fund in which it exercised such oversight. That fact was corroborated by the affidavit of Grace Lau. Mr. Froese also stated that shortly after the release of the Keller award, in May, 2006, Local 183 had finalized a written agreement in accordance with his recommendation.

44. A number of affidavits were submitted to rebut Mr. Keller's findings regarding improper expenditures on surveillance. The most notable of those was the affidavit of Tony Dionisio, the Business Manager. Mr. Dionisio acknowledged that he was aware that certain business representatives employed by Local 183 were being followed because of a concern that together with LIUNA officials, these employees might be engaged with organized crime figures. He asserted that the Local was particularly concerned that the employees were not forthcoming about having met the representative of the Tri-Fund who was already under investigation. In any event, Mr. Dionisio attested that he was not aware of the extent or breadth of the surveillance until the Keller proceedings. In particular he did not know that a member other than the employees was the target of surveillance. He added that he would never order surveillance for the purpose of monitoring dissent or opposition within the Local.

45. A number of affidavits were also filed to challenge the findings regarding forgeries of collective agreements. The most notable of those were the affidavits of Tony Dionisio and Rocco Lotito, the aforementioned high rise trim sector coordinator. In his affidavit, Mr. Dionisio asserted that he had no recollection of the meeting with Jamie Melo that Mr. Melo testified about before Mr. Keller. He also asserted that he never gave approval to any forgeries of any collective agreement. In explaining his evidence, Mr. Dionisio stated the following at paragraph 123 of his affidavit:

> Having been a Union Business Representative and official for a great many years, I am certainly aware of the damage that could occur to Local 183 because of an actual and/or even an alleged forgery by one of our business representatives…

46. Mr. Dionisio also stated that he had taken and passed a lie detector test to confirm this evidence and he filed that report of the test with the Board.

47. Mr. Dionisio explained that he did not give this or any other evidence during the proceedings before Mr. Keller because he did not think the evidence before Mr. Keller had substantiated the charges regarding the forgeries. He also added at paragraph 127 that given the charged atmosphere between LIUNA and Local 183, "… I did not think it was necessary or advisable for me to be cross-examined by Mr. Pink [the GEBCC] in an atmosphere where I felt that he would have attacked me, as he did others, for purely political reasons." Mr. Dionisio explained that he had no such reluctance to give evidence before the Board and to be cross-examined in these proceedings.

48. Mr. Lotito also denied instructing Mr. Melo to forge any agreements and further denied that any such instruction or suggestion was given in the presence of Mr. Dionisio. It is important to note that although Mr. Lotito did not testify before Mr. Keller, the Keller award indicates that the parties agreed that no adverse inference should be drawn from the failure of Mr. Lotito to testify. The award does not reflect a similar agreement regarding the failure of Mr. Dionisio (or anyone else, for that matter) to testify.

Additional Information Regarding LIUNA Elections

49. In correspondence filed before the consultation I was informed by counsel for Local 183 that LIUNA was scheduled to hold a convention in September, 2006. This became relevant

because one of the purposes of the convention was to nominate persons to seek the elected office of LIUNA Regional Vice-President for Central and Eastern Canada. The office was presently being held by Joseph Mancinelli.

50. This position was, up until this time, an appointed position. However, by virtue of government supervised constitutional reform in the United States it was mandated that the position would be subject to election for the first time in 2006. Local 183 had expressed its intention to support a candidate in opposition to Mr. Mancinelli's for election. Local 183 had further expressed concern that if it were under trusteeship, that the delegates it had nominated for the convention would not be allowed to participate in the convention according to LIUNA rules. Indeed, Local 183 was concerned that the attempt to place Local 183 into trusteeship was being spearheaded by Mr. Mancinelli in an attempt to prevent an opposition candidate from being nominated for his position.

Positions of the Parties

51. LIUNA first submitted that s. 147 of the Act was not applicable to these proceedings as LIUNA was not attempting to alter the jurisdiction of Local 183 within the meaning of that section.

52. With regard to s. 149 of the Act, it was the primary position of LIUNA that the Board should adopt and apply the findings of the Keller award to this case. Indeed, counsel for LIUNA submitted that the question of whether there was just cause for the trusteeship had already been determined. LIUNA relied on the doctrine of issue estoppel for its submission that the Board could not reach a different conclusion on the justness of the trusteeship.

53. Local 183's position was that the doctrine of issue estoppel was not applicable to this case and that Mr. Keller could not usurp the function of the Board in administering ss. 147 and 149 of the Act. Counsel submitted that a review of the entire history confirmed that LIUNA was motivated by bad faith in its dealings with Local 183 and in that context there could not be just cause for the trusteeship. In any event, even if just cause was established (as a result of the Keller award or otherwise) counsel submitted that the Board should exercise its discretion under ss. 149(5) of the Act to make an appropriate remedy other than allowing LIUNA to implement trusteeship

Analysis and Decision

Section 147 of the Act

54. In his award Mr. Keller expressly referred to s. 149 of the Act and stated that in light of that section the parties agreed that the issue for determination was whether there was just cause for the imposition of trusteeship. Mr. Keller did not make any reference in his award to s. 147 of the Act. That section was raised to resist trusteeship for the first time in these proceedings (although as noted earlier, Board File No. 2049-03-U included a complaint under s. 147 relating to an alleged attempt by LIUNA to restrict the scope of Local 183's ability to organize employees). In considering the application under this section it is helpful to consider the wording of both ss. 147 and 149. They provide as follows:

147. (1) A parent trade union shall not, without just cause, alter the jurisdiction of a local trade union as the jurisdiction existed on May 1, 1992, whether it was established under a constitution or otherwise.

(2) The parent trade union shall give the local trade union written notice of an alteration at least 15 days before it comes into effect.

(3) On an application relating to this section, the Board shall consider the following when deciding whether there is just cause for an alteration:

1. The trade union constitution.

2. The ability of the local trade union to carry out its duties under this Act.

3. The wishes of the members of the local trade union.

4. Whether the alteration would facilitate viable and stable collective bargaining without causing serious labour relations problems.

(4) The Board is not bound by the trade union constitution when deciding whether there is just cause for an alteration.

(5) If a local trade union makes a complaint to the Board concerning the alteration of its jurisdiction by a parent trade union, the alteration shall be deemed not to have been effective until the Board disposes of the matter.

...

149. (1) A parent trade union or a council of trade unions shall not, without just cause, assume supervision or control of or otherwise interfere with a local trade union directly or indirectly in such a way that the autonomy of the local trade union is affected.

(2) A parent trade union or a council of trade unions shall not, without just cause, remove from office, change the duties of an elected or appointed official of a local trade union or impose a penalty on such an official or on a member of a local trade union.

(3) On an application relating to this section, when deciding whether there is just cause, the Board shall consider the trade union constitution but is not bound by it and shall consider such other factors as it considers appropriate.

(4) If the Board determines that an action described in subsection (1) was taken with just cause, the Board may make such orders and give such directions as it considers appropriate, including orders respecting the continuation of supervision or control of the local trade union.

55. It is typical both within and outside the construction industry for a parent union to delineate the scope of a local's entitlement to seek and administer bargaining rights. That scope will invariably have a geographic limitation which, in Ontario may be for a particular municipality or group of municipalities, or may be province-wide. The scope may also be restricted to employees employed in particular trades or industries, or even to employees employed by particular employers.

56. Section 147 seems particularly designed to restrict a parent's ability to alter the scope of a local's chartered activities in this context. Any alteration to the geographic scope of a local's activities could clearly be subject to consideration under this section. The same would be true of an alteration in the local's chartered entitlement to represent employees by trade, industry or employer. As an example, the Board was required to apply s. 147 of the Act in considering an alteration in the ability to continue to represent employees of the former Ontario Hydro in *International Brotherhood of Electrical Workers*, [1996] OLRB Rep. February 70.

57. Section 149 on the other hand, invites a consideration in the assumption by a parent of supervision, control or any interference in the local "...in such a way that the autonomy of the local trade union is affected." This section clearly applies to the imposition of trusteeship as such imposition constitutes the penultimate interference with the autonomy of the local. Indeed it typically results (as it did in this case) in the transfer of responsibility for the administration of the local from the elected leadership of the local to a trustee appointed by the parent.

58. Although a parent must meet a standard of just cause in both sections there are important reasons for distinguishing the type of activity complained of and the applicable section to be considered. Most significantly, ss.147(5) provides that an application under s. 147 stays the alteration of jurisdiction until the application is disposed of. No such stay is provided for under s. 149.

59. In many instances an alteration of the jurisdiction of the local may be significant enough as to constitute an interference with the autonomy of the local within the meaning of s. 149. However, in a case such as this where there has been no change in the scope of the local's entitlement to administer bargaining rights, the imposition of trusteeship did not, in my view, constitute an alteration of jurisdiction within the meaning of s. 147 of the Act.

Just Cause Under Section 149 and Issue Estoppel

60. Before considering the impact of the Keller award in this case it is useful to highlight the principles that the Board has considered and applied in determining whether just cause for the imposition of a trusteeship can be found. In *International Union of Bricklayers and Allied Craftworkers*, [2001] OLRB Rep. May/June 802 (May 2, 2001), the Board provides a useful summary of those principles at paragraph 25. While careful to note the summarized principles were only those applied in the decisions to that time and should not be construed as a definitive list of factors to be applied, the list is still a broad and helpful one. The list of principles was summarized as follows:

> 1) A parent union has the right to protect and advance the primary values and the institutional integrity of the Union. A parent and a local union

> may be in conflict, but they are not strangers in an arms-length relationship.
>
> 2) The parent union does not require the consent of the local union to take action.
>
> 3) The parent union may impose a temporary trusteeship on a local union to correct a specific problem and must relinquish that control of the local union once the problem has been corrected.
>
> 4) The power of the parent union to impose a trusteeship (in the classic sense) is limited by section 149. The section is in part an attempt to address a central tension in the internal affairs of most construction unions. That tension springs from the reality that while a union's organizational authority is highly concentrated in the hands of the parent, the primary activities of the union (collective bargaining and benefit administration) are in the hands of the local. The Act has
>
> 5) Local unions are entitled to be in conflict with their parent unions. The extent to which they are entitled to be in conflict is inevitably fact driven. It will usually be the case that a local union is entitled to avail itself of any rights to which it is entitled *by virtue of the statute*, notwithstanding any degree of conflict with the parent that the exercise of such rights may generate. The issue of the institutional relationship between the parent union and local unions in Ontario is one which may lead to conflict. The fact that a local union may wish to pursue a more independent course from the parent than the parent would like is not, *in and of itself*, just cause for interfering in local union's affairs by means of trusteeship or other methods of control. The steps a local union undertakes in pursuit of such greater autonomy *may* justify trusteeship.
>
> 6) The parent union may have just cause to impose a form of trusteeship when the actions of the local union go beyond "legitimate dissent" and constitute a threat to the values of a union, or to its ultimate institutional integrity, or to the financial or institutional stability or survival of the local union, provided that none of these factors would unduly prevent the local union from effectively exercising its rights, duties and privileges under the Act. Much will depend on an assessment of the facts in each case.
>
> 7) Process, which need not meet the standards of "natural justice" that a tribunal such as this Board must adhere to, will be of varying degrees of importance. In *IBEW #1* the Board gave great weight to the result and little to the process. In contrast in Board File No. 2532-98-U the Board placed significant weight on a lack of process. That latter case seems to depend greatly on a finding that the IU failed to provide the Ontario Locals and the OPC with the opportunity to "explain and defend" their actions. On this issue, context will entirely define the degree to which process and the application of any standards of process are relevant to a finding of just cause or a lack thereof.

61. The first task in this case is to determine whether LIUNA has established just cause for the imposition of trusteeship. If, and only if just cause is established, it then falls to the Board

to determine the particular relief that is appropriate in all the circumstances. The first task – namely the determination of whether just cause has been established – is precisely the issue that the parties had asked Mr. Keller to determine. However, having determined that just cause for trusteeship had been established, his only remedial authority, in accordance with the agreement of the parties, was to grant the application and recommend trusteeship to LIUNA. He did not have the authority to limit the scope of any trusteeship or to order some alternative and he certainly did not have the broad remedial authority that the Board has in ss. 149(4) of the Act to provide a remedy appropriate to all the circumstances. Therefore, in considering the principal of issue estoppel, it would not seem to apply to prevent the Board from exercising its remedial authority under ss. 149(4), as that is a remedial authority that Mr. Keller was unable to consider. However, the doctrine could be considered in the initial determination of whether just cause for trusteeship exists.

62. The principle of issue estoppel has been applied in the courts and by this Board to prevent parties from relitigating issues or matters which have already been litigated by the same parties in the same or in a different forum. These principles have been applied and upheld by the Supreme Court of Canada in a number of recent cases including *Bourdon v. Stelco Inc.*, [2005] 3 S.C.R. 279; *Toronto (City) v. C.U.P.E. Local 79*, [2003] 3 S.C.R. 77 and *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460. In *Danyluk v. Ainsworth Technologies Inc.*, Mr. Justice Binnie, at paragraph 24 of his decision, quotes the following definition of issue estoppel from the judgement of Middleton J.A. in *McIntosh v. Parent*, [1924] 4 D.L.R. 420 at p. 422:

> When a question is litigated, the judgement of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgement remains.

Binnie, J. then went on to discuss the application of this definition in subsequent cases. In particular, he referred to the judgement of Dickson, J. in *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 and described the application of the doctrine in the following terms: "the estoppel extends to the material facts and conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.

63. In *City of Toronto*, Arbour J. repeated the three preconditions for establishing issue estoppel in the following terms at p. 298:

> Issue estoppel is a branch of *res judicata* (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies …

64. In my view, the three preconditions are met in this case with respect to the determination of the existence of just cause for the trusteeship. The parties before Mr. Keller are before me. They attorned to Mr. Keller's jurisdiction and specifically asked him to determine whether just cause for trusteeship existed within the meaning of ss. 149 of the Act. He issued a final adjudicative decision in this matter and determined the precise question which the Board must also determine in this case.

65. Still, the existence of the preconditions for estoppel does not end the analysis of this doctrine. That is because issue estoppel is an equitable doctrine and the courts (or the Board in this case) retain discretion to decline to apply the doctrine even where the preconditions for its application exist. For example, in *Danyluk v. Ainsworth Technologies Inc.*, the Court determined that the preconditions for an application of issue estoppel were met, but the Court exercised its discretion not to apply the doctrine. In that case, the defendant in a wrongful dismissal claim for wages and commissions was seeking to have the action dismissed because an Employment Standards Officer had already rejected the claim under the *Employment Standards Act*. In exercising its discretion in this way the Court considered a number of factors including the fact that the officer did not have legal training, the fact that the claim for commissions was not adequately dealt with, and the fact that the officer did not adhere to principles of natural justice. It is important to note, as Binnie, J., did at p. 494, speaking for the Court, that the list of factors to be considered is open and dependent on the circumstances in each case.

66. In this case, the parties made considerable expenditures of time and expense in the proceedings before Mr. Keller. The parties were given opportunity to fully examine and cross-examine witnesses and to make their submissions. Mr. Keller is recognized within the labour relations community as one of the most experienced and respected adjudicators in this field.

67. Local 183 submits that I should rely on affidavit material filed before me in order to decline to accept Mr. Keller's determination of just cause. I do not think it is appropriate to do so. Much of the most significant affidavit material, particularly the material concerning the forgery of collective agreements and surreptitious surveillance, contained evidence that could have been presented before Mr. Keller and was not. I see no reason why I should now consider such evidence as a basis for not accepting Mr. Keller's factual findings regarding the charges in front of him.

68. I should also add that in my view, based on those factual findings, Mr. Keller's determination of just cause is consistent with the principles outlined by the Board in *International Union of Bricklayers and Allied Craftworkers*. It is surely inconsistent with the core values of LIUNA and Local 183 to expend union funds on surreptitious surveillance conducted for the purpose of preserving the positions of those in power. It is also inconsistent with those core values to approve the forgery of collective agreements. That much was acknowledged by Mr. Dionisio in his own affidavit.

69. In light of the foregoing, I have therefore found that it is appropriate to exercise my discretion to apply the doctrine of issue estoppel and I have found that LIUNA has established just cause for the imposition trusteeship.

Remedy

70. The remedy that I issued in the June 12 decision was reflective of three concerns. First, I was sensitive to the concern expressed by Local 183 that the members of Local 183 (and any officers not implicated and Mr. Keller's findings) not be precluded from participating in the LIUNA convention and opposing the bid for election by Mr. Mancinelli. It is for this reason that I remained seized to deal with matters pertaining to the selection of delegates to the convention.

71. I was also concerned that there not be an unwarranted purge of former officers from membership of the Local. I appreciate that a trustee may have to have some turnover of staff in a trusteeship and do not think it is appropriate for the Board to micro manage this or any other trusteeship. However, I do think it would be beneficial if a decision on whether to suspend or expel any former officers of the Local be taken by the successor executive that is elected by the membership. Obviously, there might be circumstances where the conduct of one of the former officer might justify more immediate suspension or expulsion. In my view it was appropriate for me to remain seized to review any proposed suspensions or expulsions during the trusteeship, before they took place.

72. Finally, as I stated earlier, it is not appropriate for the Board to micro-manage the trusteeship. However, given the degree of animosity that exists in this case and the various interests that are represented, and given the large membership in this Local, I considered it appropriate to Order LIUNA to prepare a plan for taking the Local out of trusteeship and to inform the membership of such plan so that issues and concerns over that plan could be raised before the Board.

COURT PROCEEDINGS

1785-05-R (Court File No. 209/06) City of Hamilton, Applicant v. United Brotherhood of Carpenters and Joiners of America, Local 18 and Ontario Labour Relations Board, Respondents

Certification – Construction Industry – Evidence – Judicial Review – Natural Justice –Practice and Procedure – Reconsideration – The Carpenters moved to set aside the decision of a single judge of Divisional Court permitting the employer to rely on an affidavit in support of its judicial review application of the Board's certification decision (see November 2006 *Highlights)* – A full panel of the Divisional Court held that the motions judge was not "clearly wrong" in concluding that one paragraph of the affidavit ought to be received by the reviewing panel in support of the employer's allegation that it was denied natural justice by the Board – The balance of the affidavit, however, should be struck because it contains material not before the Board and it is clear the Board's decision was rendered on the basis of evidence before it – The "new evidence" foundation for judicial review cannot succeed – Motion allowed in part

Superior Court of Justice (Divisional Court) Lane, Swinton and M.G.J. Quigley JJ, January 29, 2007

ENDORSEMENT

[1] On this motion, United Brotherhood of Carpenters and Joiners of America, Local 18 (the "Union"), moves under subsection 21(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, to set aside a decision of Madam Justice Ellen Macdonald dated October 24, 2006. In her decision, Macdonald J., sitting as a single judge of the Divisional Court, dismissed a motion brought by the Union to strike out all or part of the affidavit of Gary F. Kuzyk. The City of Hamilton (the "City") filed that affidavit in support of its May 2006 application for judicial review of the September 12 and November 9, 2005 decisions of the Ontario Labour Relations Board. Those decisions resulted in the certification of the Union as bargaining agent for a number of carpenters employed by the City working in construction, and a determination by the Board not to reconsider that decision. It was accepted by the parties before us that the argument of the judicial review application must await the resolution of this motion respecting Macdonald J.'s decision.

Background

[2] A bit of history is helpful to understand the circumstances in which this motion arose. On September 1, 2005, the Friday before the Labour Day weekend, the Union filed an application for certification with the Board to represent carpenters and carpenters' apprentices employed by the City in the construction industry. The Union stated in that application that to the best of its knowledge it was submitting membership evidence on behalf of two of three persons in the bargaining unit. The Union was required to deliver a copy of its certification application to the City and did so by fax transmission addressed to Mr. Nick Roundis, a facilities supervisor with the City.

[3] Apparently unbeknownst to the Union, the fax number used to send the certification application was not the usual number at which Mr. Roundis received facsimile transmissions. It was not the office location to which he regularly reported for work and he checked the receipt of fax transmissions to this number at that different office location only infrequently. Consequently, it took some days for the Union's certification application to come to the City's attention.

[4] By that time, the two-day response period stipulated in subsection 128.1(3) of the *Labour Relations Act*, 1995, S.O. 1995, c. 1, Schedule A, as amended (the "*Act*") had expired. That was the statutory period within which the City was required to respond to the Union's certification application. The last day for response by the City was September 6, 2005. In the absence of a response from the employer, the Board issued a decision on September 12, 2005 certifying the Union as the bargaining agent for the particular individuals. It did so on the basis of the material filed before it by the Union.

[5] On October 7, the City filed a Request for Reconsideration. It asked the Board to reconsider its earlier decision and revoke the certificate it issued to the Union. The City's Request for Reconsideration was a substantial document. It comprised 141 pages of factual

assertions, submissions and argument in support of its reconsideration request. Several grounds for reconsideration were advanced, but the principal ground upon which the request was made was that the City had not been "properly" served by the Union with the original certification application. The City asserted that the failure to provide it with timely notice was the only reason that it failed to file a timely response with the Board. The Union filed a response to that reconsideration request. Amongst other things, it responded that it had obtained the contact information for Mr. Roundis directly from "his assistant."

[6] On November 9, 2005, the Board issued a decision in response to that and the other two grounds advanced by the City in the reconsideration request. It stated that the only ground that had any likelihood of causing it to reconsider its decision was the assertion that improper delivery of the certification application had deprived the City of its right to file a response and/or provide the employer information mandated by the Act within the statutory time limits set out in subsection 128.1(3). However, in the Board's view, improper service alone would not have provided the City with a basis to disturb the Board's findings respecting the three individuals in the proposed bargaining unit. It would only have permitted the employer to argue about the nature of the work being performed on the day of the Union's application. The Board determined not to reconsider its decision, dismissing the alternative grounds of argument as the basis to merit reconsideration, and concluding that the untimeliness of the City's response would not have affected the result.

[7] This conclusion, however, was subject to one important caveat. The Union insisted that it had provided adequate service of notice to the City when it faxed the application to Mr. Roundis. It stressed that it had received the fax number to which it directed the certification application directly from "Mr. Roundis' assistant". Therefore, in its submission, it was not open to the City to assert it had not been properly served. The Board decided that, if the City disputed that assertion by the Union, it would allow the City one last possibility of reconsideration provided it made submissions on the point, including all material facts, by November 15, 2005. The City chose not to take up that invitation from the Board. Instead, it commenced this application for judicial review of the Board's decisions five months later in May of 2006.

[8] As stipulated by the *Judicial Review Procedures Act*, R.S.O. 1990, c. J.1 as amended, upon receipt of the City's application for judicial review, the Board prepared and filed with this Court the record of proceedings in which the decisions under review were made. Those proceedings amounted to a record of a "paper hearing". No *viva voce* evidence was heard and no transcripts were prepared. Since no actual hearing was ever held by the Board, the record prepared by the Board constitutes as complete and accurate an account as is available of the information and submissions that the Board had before it when it made the two decisions that are now the subject of judicial review.

Admissibility of the Kuzyk Affidavit

[9] In spite of the existence of a full documentary record from the Board's original certification and subsequent reconsideration decisions, the City sought to introduce further evidentiary support for its application for judicial review. It filed the affidavit of Gary J. Kuzyk sworn May 10, 2006. It also filed its Applicant's factum on the judicial review application. Not surprisingly, that document refers to and relies heavily upon the facts asserted in the Kuzyk affidavit. It is the additional information, allegations and characterizations contained in the Kuzyk affidavit, going beyond the record prepared by the Board, to which the Union takes exception. It is that material which caused the Union to bring its motion before Macdonald J. to strike out all or portions of that affidavit and related portions of the factum. That motion raised squarely the extent to which new affidavit evidence not advanced before a tribunal ought to be permitted on judicial review of that tribunal's decision.

[10] The City asserts that the Board's decisions are in breach of natural justice, given that the City had none of its information before the Board at the time of the initial certification decision, and that the Board chose to deny the City's reconsideration request in the face of the City's extensive written submissions. As the motions judge phrased it at paragraph 5 of her endorsement:

> Further, it is said that a denial of natural justice occurs from the Board's refusal to reconsider the certification of the respondent Union after the Board learned of the City's failure to receive proper notice of the application and this, combined with the Board's refusal to give the City the opportunity to be heard or participate in the certification process, constitutes a denial of natural justice.

The motions judge then continued at paragraphs 6 and 7 as follows:

> Confining myself to the sole issue of whether or not it is proper for the City to file Mr. Kuzyk's affidavit in support of the application for judicial review, I conclude that the City is correct in its assertion that Mr. Kuzyk's affidavit properly provides evidence that may establish the Board's denial of natural justice to the City. The affidavit deposes that the Board certified the respondent Union in circumstances where there was an absence of evidence before the Board which ought to have been there when the Board exercised its power to certify the respondent Union.
>
> In the face of precedent for the admission of affidavit evidence to show a denial of natural justice by the Board, I have determined that in these circumstances the City is entitled to establish a denial of natural justice through the proposed affidavit evidence and ought not to be restricted to the record of the administrative tribunal responsible for the denial of natural justice. It is correct to say, as the City does in paragraph 38 of its factum, that it is evident that where an application for judicial review relates to serious issues of natural justice, it is preferable for the court to take in account sworn evidence that is directly relevant to this issue rather

> than to be limited to a party's pleadings before the tribunal or the tribunal's synopsis of those pleadings. I agree that judicial review of a denial of natural justice requires the Divisional Court to consider the entire evidentiary record, relevant circumstances, and factual context. I also agree that in the circumstances of this case the City is entitled to submit affidavit evidence that relates to the issue of whether or not the Union possessed the requisite level of membership support.

[11] The moving party submits that the motions judge erred in concluding that the City's allegations that it was denied natural justice entitle it to advance new affidavit evidence on judicial review of the Board's decision. On that judicial review, it argues that the City should be restricted to the record of the Board and pleadings that were before it and on which it reached its decisions. It argues that courts in Ontario have consistently held that affidavit evidence in support of an application for judicial review should be admitted in only the most exceptional of circumstances. In *Re Keeprite Workers' Independent Union et al. v. Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (O.C.A.) at page 521, Morden J.A. stated

> …the practice of admitting affidavits of this kind should be very exceptional, it being emphasized that they are admissible only to the extent that they show jurisdictional error. I would think that the occasions for the legitimate use of affidavit evidence to demonstrate the exacting jurisdictional test of a complete absence of evidence on an essential point would, indeed, be rare.

> See also: *Re Securicor Investigations and Security Ltd. and Ontario Labour Relations Board et al.*, (1985), 50 O.R. (2d) 570 (Ont. Div. Ct.) and *Medis Health and Pharmaceutical Services Inc. v. Teamsters, Chemical and Allied Workers, Local 132*, [2001] O.J. No. 2254 (Ont. S.C.J.).

[12] These cases establish, in the moving party's submission, that there are only two circumstances where our courts have permitted affidavit evidence to be admissible in support of a judicial review application. The first is where it is alleged that the Board made a finding of fact on an essential point when there was no evidence to support the Board's finding, and the second is where there has been an allegation of a denial of natural justice that cannot be proven by mere reference to the Record of the Board.

[13] The motions judge had jurisdiction under subsection 20(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 to entertain the City's motion seeking an order permitting the introduction of the Kuzyk affidavit on the application for judicial review. In the course of considering that motion and reaching her decision, the motions judge exercised her discretion to permit the whole of the affidavit to be admissible at the judicial review hearing before a full panel of this Court. The authorities make clear that the motions judge was entitled to exercise that discretion as she considered fit in the circumstances, and we are permitted to intervene in the exercise of her discretion only if she misdirected herself or if her decision is "clearly wrong": see *Elsom v. Elsom*, 1989 CanLII 100 (S.C.C.), [1989] 1 S.C.R. 1367 (S.C.C.); *Peel Non-Profit Housing Corp. v. McNamara*, [1991] O.J. No. 364 (Ont. Div. Ct.); *Salter v. Beljinac*, [2001] O.J. No. 2792 (Ont. Div. Ct.).

[14] Dealing first with evidence relating to notice, we are of the view that the motions judge was not "clearly wrong" in concluding that affidavit evidence ought to be received by the Divisional Court on this issue as it goes to establish the City's allegation that it was denied natural justice by the Board.

[15] The Divisional Court has the right to have before it evidence that may be relevant to the natural justice issue, even if it was not contained in the Board's record. In reaching this conclusion, we are not addressing the Union's assertion that an opportunity was provided to the City in the Board's November 9 reconsideration decision to bring such evidence to the Board itself or the uncontested fact that the City declined to avail itself of that opportunity. These are matters that may more properly be considered by the panel of the Divisional Court hearing the application as part of its overall consideration of the merits. Accordingly, we would not interfere with the motions judge's refusal to strike paragraph 3 of the Kuzyk affidavit.

[16] However, the motions judge erred in failing to strike paragraphs 4 to 14. These paragraphs of the Kuzyk affidavit contain material not before the Board. This material did not factor into the Board's decision-making process, either on the initial decision, or on the decision given in response to the reconsideration request. On the application for certification, the Board had the Union's material. On the City's Request for Reconsideration the Board had the very extensive documentation provided by the City in support of its request as well as the Union's response.

[17] In our opinion, the *Keeprite* decision, and others that have followed and applied it, provide clear direction that the evidence in paragraphs 4–14 is not admissible. In the present case, as noted, the City filed voluminous materials on the reconsideration application to the Board in support of its contention that the Board had erred in certifying the Union. The "no evidence" foundation for judicial review cannot succeed as the basis to permit the introduction of the Kuzyk affidavit.

[18] In our opinion, there is evidence that was before the Board both at the time of its original certification decision and at the time of its decision not to reconsider that decision with respect to these matters. This is not a case where there was no evidence before the Board. Neither is there any indication that the information in the Kuzyk affidavit was not available at the time of the Reconsideration request. In accordance with the *Keeprite* principle, we conclude that the interests of justice do not require that the balance of the Kuzyk affidavit, consisting of paragraphs 4 through 14, are required to permit another panel of this Court to consider the City's judicial review application with respect to the Board's decision. For this reason, we allow the Union's motion in part. The order of the motions judge is set aside and an order is to go striking paragraphs 4 to 14 of the affidavit and requiring the City to file an amended factum without reference to those parts of the affidavit.

[19] In light of the fact that success on this motion was divided, there will be no costs for this motion or the motion before Macdonald J.

1702-04-R; 3120-04-R; 3172-04-R; 3173-04-R; 3174-04-R (Court File No. 126/06) Greater Essex County District School Board, Applicant v. International Brotherhood of Electrical Workers, Local 773; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, International Union of Bricklayersand Allied Craftworkers, Local 6, The International Union of Painters and Allied Trades, Local 1494, and Labourers International Union of North America, Local 625 and OLRB, Respondents

Construction Industry – Judicial Review – *Public Sector Labour Relations Transition Act* – Related Employer – Sale of Business – The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the *PSLRTA* – The GECDSB sought judicial review of the Board's ruling – A majority of the Court confirmed the Board's finding that while the *PSLRTA* specifically precludes the application of s. 69 of the *Labour Relations Act, 1995* to events covered by that legislation, nothing in the *PSLRTA* prevented the Board from exercising its discretion under s. 1(4) to the same events – Application for judicial review dismissed

Superior Court of Justice (Divisional Court), Carnwath, Spence and Sachs JJ. January 22, 2007.

OVERVIEW

[1] This is an application to review and set aside several decisions of the Labour Relations Board (the "Board") that were made as a result of applications brought by the Respondent Unions under s.1(4) of the Labour Relations Act (the "Act")[1] to declare that the Applicant (Greater Essex County District School Board) and the former Board of Education for the City of Windsor (the "Windsor Board") should be treated as a "single employer" for the purposes of the Act. The effect of the decision is that the provincial collective agreement of the Windsor Board binds the Applicant outside the geographic jurisdiction of the City of Windsor.

[2] The first issue raised on the application for judicial review is the standard of review applicable to a decision of the Board that involves the interpretation of a statute or regulation. The Applicant employer submits that the appropriate standard is correctness. The Respondent Unions say that the standard is patent unreasonableness. However, the Applicant also argues that, applying either standard, the decisions under review cannot stand.

[3] For the reasons that follow, I find that the appropriate standard of review this Court should apply to the Board's decision is patent unreasonableness. Applying that standard, I would dismiss the application.

FACTUAL BACKGROUND

The Situation Prior to January 1, 1998

[4] Before January 1, 1998, there were two public school boards in the Greater Windsor/Essex County area: the Windsor Board (which looked after the City of Windsor) and the

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[1] s.o. 1995, C.1

Essex County Board (which looked after the County of Essex, except for the City of Windsor). Both Boards were created pursuant to the authority of the Education Act[2].

[5] Each of the Respondent Unions was certified under the construction industry provisions of the Act to be the bargaining agents, in their respective trades, of the employees of the Windsor Board who performed construction work in those trades. Additionally, pursuant to Section 163(2) of the Act, the relevant provincial collective agreement became binding upon the Windsor Board. Under the Act, a provincial collective agreement is a collective agreement whose geographic jurisdiction is the Province of Ontario.

[6] Prior to January 1, 1998, none of the Respondent Unions held bargaining rights with respect to the employees of the Essex Board.

Changes Effected as of January 1, 1998

[7] In 1997, the Ontario Legislature enacted the Fewer School Boards Act[3] and the Education Quality Improvement Act[4]. As a consequence of these statutes, as of January 1, 1998, the Applicant (The Greater Essex County District School Board) was created and both the Windsor Board and the Essex County Board were "*merged with and continued as*" the Applicant.

[8] Transition Act (P.S.L.R.T.A.)[5]. The P.S.L.R.T.A. is legislation that was enacted, among other things,

> *to facilitate the effective and rationalized bargaining unit structures in restructured broader public sector organizations"* and *"to facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees following restructuring in the broader public sector and in other specified circumstances.*[6]

[9] Pursuant to Section 7 of the P.S.L.R.T.A., it applied "*upon the assumption by a district school board of the jurisdiction of two or more old boards*". Thus, the P.S.L.R.T.A. applied to the Applicant and its relationship with the Respondent Unions.

[10] The following are the provisions of the P.S.L.R.T.A. that are relevant to this application. Section 7(2) of the P.S.L.R.T.A. specifies that:

> *for the purposes of this Act, the old boards are the predecessor employers and the district school board is the successor employer.*

[11] Section 13 of the P.S.L.R.T.A. states that Section 69 (the successor employer provision of the Act) "*does not apply with respect to an occurrence described in Sections 3 to 10*". Pursuant

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[2] S.O. 1997, c. E-2

[3] S.O. 1997, c.3

[4] S.O. 1997, c. 31

[5] S.O. 1997, c. 21

[6] Ibid, s. 1

to Section 7, one of these occurrences is "*the assumption by a district school board of the jurisdiction of two or more old boards*".

[12] With respect to bargaining units and their bargaining rights, Section 14 of the P.S.L.R.T.A. provides as follows:

> **Bargaining Units**
>
> 14(1) *On the changeover date*[7] *each bargaining agent that had bargaining rights in respect of a bargaining unit of a predecessor employer immediately before the changeover date has bargaining rights in respect of a like bargaining unit of the successor employer, but the description of the bargaining unit shall be such as to include only,*
>
> *(a) employees who immediately before the changeover date were employees of the predecessor employer in the bargaining unit for which the bargaining agent has bargaining rights, and*
>
> *(b) employees who are hired to replace employees described in clause (a).*

With respect to the application of collective agreements and the status of successor employers in relation to those agreements, the P.S.L.R.T.A. contains the following provisions:

> **Collective Agreement**
>
> 15(1) *The collective agreement, if any, that applies with respect to employees of a predecessor employer immediately before the changeover date continues to apply with respect to those employees who are employed by the successor employer on or after the changeover date and with respect to employees hired by the successor employer to replace such employees.*
>
> . . .
>
> **Status of successor employer**
>
> (3) *The successor employer is bound by the collective agreement if he, she or it had been a party to it. The successor employer shall be deemed to be the employer under the collective agreement.*

[13] The P.S.L.R.T.A. delegates authority to the Lieutenant Governor in Council to make certain regulations. Specifically, respecting the construction industry, the P.S.L.R.T.A. provides as follows:

> **Regulations**
>
> 40(1) *The Lieutenant Governor in Council may make regulations,*
>
> ....
>
> *(b) governing how this Act applies with respect to employees of a predecessor employer who perform construction work and who,*

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[7] January 1, 1998

> *immediately before the changeover date, are in a bargaining unit with respect to which a construction union has bargaining rights;*
>
> ....
>
> (3) *A regulation under clause (b) may,*
> *(a) vary the application of this Act;*
> *(b) prescribe provisions to operate in place of any part of this Act;*
> *(c) prescribe provisions to operate in addition to this Act.*

[14] Pursuant to this authority the Lieutenant Governor in Council passed Ontario Regulation 457/97 (the Regulation). The relevant portion of the Regulation reads as follows:

> 1. (1) *If a predecessor employer was a municipality or a school board and a construction union had bargaining rights with respect to a bargaining unit of that employer that contained or would have contained employees who performed construction work, the following apply:*
>
> *1. The description of the bargaining unit of the successor employer referred to in subsection 14(1) of the Act shall not include, or be changed under section 22 of the Act to include, employees who perform construction work outside the geographic jurisdiction of the predecessor employer unless the successor employer agrees.*
>
> *2. Despite Sections 15 and 24 of the Act, a collective agreement that bound the predecessor employer immediately before the changeover date does not bind the successor employer with respect to construction work performed outside the geographic jurisdiction of the predecessor employer unless the successor employer agrees.*

[15] Thus, pursuant to paragraph 2 of Section 1(1) of the Regulation, the Applicant would be bound by the collective agreement of the Windsor Board only with respect to those employees within the jurisdiction of the City of Windsor but not outside it.

[16] The P.S.L.R.T.A. also contains a provision specifying what is to happen in the event of a conflict between it and any other statute. That provision reads as follows:

> 39(1) *In the event of a conflict or inconsistency between this Act or a regulation made under this Act and any other Act, this Act or the regulation prevails.*

The Situation After the Passage of the P.S.L.R.T.A.

[17] After the passage of the P.S.L.R.T.A., the Applicant negotiated a new collective agreement with the five Respondent Unions. It was a single collective agreement between the Applicant and a council composed of representatives from the five Respondent Unions. Pursuant to that agreement, the Applicant agreed that members of the Respondents Unions would do all labour work on the current and new properties within the geographic jurisdiction of the former Windsor Board, except for certain specified preventative maintenance work. The Applicant also agreed that any work that was contracted out in the geographic jurisdiction of the former Windsor Board required that the bidder be bound to the relevant collective agreement, depending on the nature of the work.

[18] After January 1, 1998, the Applicant employed members of some, but not all, of the Respondent Unions to perform work for it, but only in schools within the geographic jurisdiction of the former Windsor Board. It did not hire any employees to perform work in the geographic jurisdiction of the former Essex County Board.

[19] The Applicant also contracted out work. If the work that was contracted out was performed in schools located in the geographic jurisdiction of the former Windsor Board, there was a requirement that the bidder be bound to the relevant collective agreement. The contracts that were contracted out for schools located in the geographic jurisdiction of the former Essex County Board did not have that requirement. Work went to the lowest capable bidder. The Board had evidence as to what work was contracted out in the geographic jurisdiction of the former Essex County Board. They had no evidence before them as to whether or not the successful bidder(s) was or were bound to any collective agreement(s). [8]

[20] In late 2004, the Applicant contracted out work at two schools located in the geographic jurisdiction of the former Essex County Board that involved work that two of the Respondent Unions alleged was construction work in the construction industry. As a consequence, the two Unions filed grievances that were referred to the Board in December of 2004.

The Unions' Applications Before the Board

[21] In August and December of 2004, several construction trade unions initiated applications before the Board. In each application, the Union sought to have the Applicant declared to be one employer with the former Windsor Board pursuant to Section 1(4) of the Act or, alternatively, they sought a declaration that the Applicant was a successor to the former Windsor Board for the purposes of Section 69 of the Act.

[22] Under Section 1(4) of the Act, the Board may declare that two or more entities should be treated as a single employer where, "*in its opinion*", they carry on related or associated business activities – whether or not simultaneously – under common control or direction. Under Section 69 of the Act, successor rights are triggered when a "*business*" or even part of a business is sold or transferred in any way.

[23] In the proceedings before the Board, the Applicant raised a preliminary objection to the Respondent Unions' applications. They argued that these applications were precluded by the P.S.L.R.T.A. and the Regulation and therefore the Board should not hear either application. On January 18, 2005, the Board decided that the Respondent Unions' applications should be referred for a full hearing.

[24] On January 4, 2006, after a full hearing and argument, the Board issued a decision whereby it dismissed the Respondent Unions' application to have the Applicant declared the successor to the Windsor Board under Section 69 of the Act. It did so having regard to Section 13 of the P.S.L.R.T.A., which provides that Section 69 of the Act does not apply to the restructuring of school boards. However, the Board granted the Respondent Unions' application under Section 1(4) of the Act and declared that the Windsor Board and the Applicant were one employer for the purposes of the Act. Further, they made the declaration effective as of January 1, 1998.

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[8] Board Decision, January 4, 2006, para. 25

[25] As a result of this decision the Applicant was bound by the provincial collective agreements as of January 1, 1998. Therefore, the geographic scope of those agreements was not limited to the geographic jurisdiction of the former Windsor Board, but applied province wide.

[26] The Applicant then applied to the Board asking it to reconsider its decision. On January 26, 2006, the Board declined to reconsider its decision of January 4, 2006.

[27] While the application for judicial review is with respect to all three of the Board's decisions, it is the decision of January 4, 2006 that resulted in the granting of the relief that affected the relationship between the Applicant and the Respondent Unions.

THE APPLICABLE STANDARD OF REVIEW

The Test - Overview

[28] The standard of review to be applied to an administrative tribunal's decision – correctness, unreasonableness, or patent unreasonableness – is determined using a "*pragmatic and functional*" approach that considers a variety of factors. These factors include the presence or absence of a privative clause or statutory right of appeal, the expertise of the tribunal relative to that of a reviewing court on the issue in question, the purpose of the legislation and the provision in particular, and the nature of the question – law, fact, mixed law and fact. It is not possible to reduce the weight to be given to each of the various factors comprising a "*pragmatic and functional analysis*" to a single legal rule[9]

The Presence or Absence of Privative Clause or Statutory Right of Appeal

[29] In making its decision, the Board was interpreting the provisions of two labour relation statutes, the P.S.L.R.T.A. and the Act. Pursuant to Section 37(1) of the P.S.L.R.T.A. the privative clauses set out at Sections 114 and 116 of the Act "*apply, with necessary modification, with respect to anything the Board does under this Act*".

[30] Sections 114 and 116 of the Act provide as follows:

> 114. *(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.*
>
> *(2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person*

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[9] Pushpanathan v. Canada (Minister of Citizenship and Immigration) [1998] 1 S.C.R. 982 [1998], S.C.J. No. 46; Dr. Q. v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226 [2003], S.C.J. No. 18; Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247, [2003] S.C.J. No. 17.

> *is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.*
>
> *(3) Where the Board has authorized the chair or a vice-chair to make an inquiry under clause 111 (2) (j), his or her findings and conclusions on facts are final and conclusive for all purposes, but nevertheless he or she may, if he or she considers it advisable to do so, reconsider his or her findings and conclusions on facts and vary or revoke any such finding or conclusion.*
>
> . . .
>
> 116. *No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.*

[31] Thus, pursuant to Section 114 of the Act, the Board has exclusive jurisdiction to determine all questions of fact or law that come before it and its decisions are "*final and conclusive for all purposes*". In Dr. Q., McLachlin C.J.C. stated:

> *The stronger the privative clause, the more deference is generally due.*[10] Section 116 is comparable to the privative clause considered by the Ontario Court of Appeal in Ontario Public Service Employees Union v. Seneca College of Applied Arts and Technology, a clause that the Court found to be a "*very strong privative clause*" that "*attracts significant deference.*"[11] Thus, a consideration of the first factor weighs in favour of deference.

Expertise

[32] This factor requires the reviewing court to consider the expertise of the administrative body under review in comparison to that of the court doing the reviewing. The courts have repeatedly affirmed the expertise of labour tribunals and, in particular, labour relations boards, on questions of interpretation of labour relations legislation. Because tribunals such as the Board work with and make determinations under the legislation on a regular basis, they have been found to have developed special expertise that is adapted to the specific context of labour relations and that is not shared by the courts.[12]

[33] The Supreme Court of Canada has described labour relations boards as an administrative body of "*high calibre*". Their competence has been characterized as follows:

> *The Labour Board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide*

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[10] Supra at para. 27

[11] (2006) 80 O.R. (3d) 1 at para. 38

[12] Ivanhoe Inc. v. U.F.C.W., Local 500 (2001), 201 D.L.R. (4th) 577 (S.C.C.) at para. 26; Canada (Attorney General) v. Public Service Alliance of Canada (1993), 101 D.L.R. (4th) 673 (S.C.C.) at 683; Royal Oak Mines v. Canada (Labour Relations Board) (1996), 133 D.L.R. (4th) 129 (S.C.C.) at pp. 150-151.

> *questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada and its labour relations sense from accumulated experience in that area*[13].

[34] The Ontario Court of Appeal recently confirmed the deference to be accorded to administrative tribunals when they are interpreting statutes that are linked to their mandate and that they encounter frequently. As articulated by Laskin J.A. in O.P.S.E.U. v. Seneca College:

> *If the statute is linked to a board of arbitration's mandate, and frequently encountered by it, then its interpretation and application of the statute warrants deference from a reviewing court.*[14]

Again, a consideration of the second factor weighs in favour of deference.

The Purpose of the Legislation and the Provisions in Question

[35] The purposes of the Act as a whole are expressed in Section 2 of the Act. They include facilitating collective bargaining, recognizing the importance of workplace parties adapting to change, promoting flexibility, productivity and employee involvement in the workplace, encouraging cooperative participation of employers and trade unions in resolving workplace issues and promoting expeditious resolution of workplace disputes.

[36] The purpose of the P.S.L.R.T.A. includes facilitating the establishment of effective and rationalized bargaining unit structures in restructured broader public sector organizations, facilitating collective bargaining between employers and trade unions following restructuring and fostering prompt resolution of workplace disputes arising from restructuring.

[37] Thus, one of the purposes of both the Act and the P.S.L.R.T.A. is to promote the prompt resolution of disputes between employers and unions, including the prompt resolution of disputes arising from restructuring. To this end, the Legislature placed the resolution of those disputes in the hands of a specialized tribunal, the Board. The integrity of that process can only be maintained if the courts give significant deference to the decisions of the Board.

[38] The purpose of Section 1(4) of the Act is to protect the bargaining rights of a trade union from being undermined by a change in the structure of an employer. The section, by its terms, provides the Board with a wide range of discretion at three points. First, the Board must decide whether "*in the opinion of the Board*" associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction. Second, if the Board makes such a finding, the Board is given discretion as to whether or not to treat the entities concerned as one employer for the purposes of the Act. Third, the Board is given discretion to grant whatever relief it "*may deem appropriate*".

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[13] Cuddy Chicks Ltd. v. Ontario Labour Relations Board et al. (1991), 81 D.L.R. (4th) 121 (S.C.C.) at p. 129.

[14] Supra at para 67

[39] The significant discretion given to the Board by the Legislature in Section 1(4) reinforces the need for deference. It signals the Legislature's decision that it is the Board who has the expertise to do the balancing required in making a decision under Section 1(4).

The Nature of the Question

[40] In coming to its determination, the Board was required to address two preliminary questions:

1. Whether the provisions of the P.S.L.R.T.A. precluded it from exercising its authority under Section 69 of the Act.

2. Whether the provisions of the P.S.L.R.T.A. precluded it from exercising its authority under Section 1(4) of the Act.

These questions were both questions of law.

[41] Once the Board answered the second question in the affirmative, it was then required to make a determination involving questions of mixed fact and law as to whether, and how, to exercise its discretion under Section 1(4) of the Act.

[42] The Applicant argued that when it came to the questions of law alone, the expertise of the Court was as great as that of the Board, particularly since the questions involved the interpretation of a statute other than the Act.

[43] The questions of law concern the interplay between two labour relations statutes. Both are statutes that the Board, unlike the courts, deal with frequently. Both concern matters that are directly within the Board's mandate and expertise. In these situations, the courts have held that considerable deference should be paid to the tribunal's decision.

[44] This principle was recently canvassed and reinforced by the Ontario Court of Appeal in National Automobile, Aerospace Transportation and General Workers Union of Canada (C.A.W. - Canada) Local No.27 v. London Machinery Inc.,[15]. In that case the Court was reviewing the decision of an arbitrator in which he was required to interpret both the collective agreement between the parties and certain provisions of the Employment Standards Act and its regulation. In finding that patent unreasonableness was the proper standard of review Cronk J.A. stated:

> [37] *The arbitrator's decision in this case concerned the interpretation of the collective agreement between the parties and various provisions of the Act and the Regulation. The legislation in issue lies at the core of the work of labour arbitrators in the employment law sector. It is both centrally related to their expertise and intimately connected to their mandate. Moreover, the interpretive issues in play here have important implications in the labour relations and employment law domains. They arise in the context of a powerful, although not full, privative clause under the L.R.A. and employment standards legislation that itself invites strong deference to the arbitral process. These factors militate in favour of a high degree of deference to the arbitrator's award.*

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[15] (2006), 79 O.R. (3d) 444 (C.A.)

These comments are equally applicable to the case at bar.

Conclusion re Standard of Review

[45] All four contextual factors point to this court according a high degree of deference to the Board's decisions. Therefore, the appropriate standard of review to apply is that of patent unreasonableness.

WHAT CONSTITUTES PATENT UNREASONABLENESS?

[46] What constitutes a patently unreasonable decision was considered by the Supreme Court of Canada in Canada (Attorney General) v. Public Service Alliance of Canada[16] as follows:

> *It is said that it is difficult to know what "patently unreasonable" means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "not having the faculty of reason, irrational, not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test.*

[47] In C.A.I.M.A.W., Local 14 v. Paccar of Canada Ltd[17], La Forest J. (Dickson C.J.C. concurring) laid out the strict test of review at p. 453:

> *Where, as here, an administrative tribunal is protected by a privative clause, this court has indicated that it will only review the decision of the Board if that board has either made an error in interpreting the provisions conferring jurisdiction on it, or has exceeded its jurisdiction by making a patently unreasonable error of law in the performance of its function...*
>
> *It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational.*

[48] In the Supreme Court of Canada decision in Voice Construction Ltd. v. Construction and General Workers' Union, Local 92,[18] the Court said that:

> *...A definition of patently unreasonable is difficult, but it may be said that the result must almost border on the absurd....*

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[16] (1993), 101 D.L.R. (4th) 673 at p. 690

[17] (1989), 62 D.L.R. (4th) 437, [1989] 2 S.C.R. 983, 40 Admin. L.R. 181

[18] [2004] 1 S.C.R. 609, para. 18

[49] In the decision in London Machinery,[19] Cronk JA. gave, as one of three reasons for the finding of patent unreasonableness, the following:

> *[77] Third, the arbitrator's analysis offends well-established principles of statutory interpretation. Those principles require that, to the extent possible, statutory provisions be interpreted harmoniously so as to avoid absurd results, including those that would defeat the purpose of the statutory scheme in issue. Moreover, an interpretation of a statutory scheme that renders part of a statute pointless, redundant or incapable of application is to be avoided. See Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham: Butterworths Canada Ltd., 2002) at pp. 243-57 and Rizzo at para. 27.*

[50] Laskin, JA. concurring, said as follows[20]:

> *[121] Thus, I conclude that the arbitrator's reasoning and the dismissal of McCleary's grievance are patently unreasonable, because they defeat the purpose of the election in s. 67 and render that election meaningless. Put differently, the arbitrator's decision is patently unreasonable because at its core, it fails to recognize that termination under the [Employment Standards Act] and termination under the collective agreement are quite distinct. An employee may be entitled to statutory termination pay at 35 weeks while still enjoying rights, including recall rights, under the collective agreement. Section 67 legislates their co-existence. The arbitrator's decision obliterates it.*

[51] In the Seneca College decision,[21] Laskin JA. said as follows:

> *[70] The Supreme Court of Canada has used a variety of adjectives and adverbs to describe a patently unreasonable decision. Many of these are summarized in Toronto (City) Board of Education v. O.S.S.T.F., District 15, supra, at paras. 41-46. See also Canada (Attorney General) v. Public Service alliance of Canada,* 1993 CanLII 125 (S.C.C.), *[1993] 1 S.C.R. 941, [1993] S.C.J. No. 35, at pp. 963-64 S.C.R. The phrases "clearly irrational" or "evidently not in accordance with reason" best describe this highly deferential standard of review. A reviewing court should not interfere with a tribunal's decision unless that decision is "clearly irrational".*

WERE THE BOARD'S DECISIONS PATENTLY UNREASONABLE?

The Position of the Applicant

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[19] Supra, at p. 468

[20] Ibid at p. 479

[21] Supra at p. 20

[52] The Applicant's submission is that the Board's decisions were patently unreasonable for the following reasons:

1. The Board's decision that, in spite of the P.S.L.R.T.A., it did have authority to exercise its discretion under Section 1(4) of the Act, and refuse to limit the geographic scope of the Unions' provincial agreements to the City of Windsor, was patently unreasonalble in that it ran contrary to what the Applicant asserts is the clear and sole purpose of the Regulation. As put by the Applicant in their factum:

> *It is beyond dispute that the Legislature which passed the P.S.L.R.T.A. and the Regulation (the same Ministry as the Ministry which is responsible for the Act, namely the Ministry of Labour) was aware of the province-wide scope of the bargaining rights held by the Respondent Unions with respect to the predecessor employer (the "Windsor Board"). It is submitted that it is precisely that situation and the bargaining rights which the Regulation is designed to limit geographically. Otherwise the Regulation is absolutely meaningless.*

Furthermore, the Applicant argues that if there is a conflict between Section 1(4) of the Act and the Regulation, Section 39 of the P.S.L.R.T.A. is clear – it is the Regulation that governs.

2. The Applicant submits that the Board's decision to exercise its discretion under Section 1(4) of the Act is patently unreasonable because:

a) a school board is not a "*business*" or other entity within the meaning of Section 1(4);

b) there were not "*two or more entities*" as required by Section 1(4) since, upon the creation of the Applicant, the Windsor Board ceased to exist;

c) the Applicant and the Windsor Board were not under common control and direction since when the Windsor Board did exist it was governed by an elected Board of Trustees that was different from the elected Board of Trustees that governs the Applicant; and

d) the Board's decision to grant relief under Section 1(4) ran contrary to its own established jurisprudence regarding the exercise of its discretion under Section 1(4) of the Act. According to the Applicant,

> *The OLRB has consistently declined to grant relief (having exercised its jurisdiction on this basis) in the absence of a significant labour relations purpose for doing so. (eg. erosion of bargaining rights) and, further, has consistently refused to grant relief where a declaration would expand bargaining rights.*

3. Finally, the Applicant submits that the Board's decision to declare the Applicant and the Windsor Board to be one employer for all purposes of the Act effective as of January 1, 1998 is patently unreasonable given that the various applications that gave rise to that declaration were not filed with the Board until August and December of 2004.

The Board's Decisions

1. The Decision that the Regulation and Section 39 of the P.S.L.R.T.A. did not Preclude the Board from Exercising its Discretion under Section 1(4) of the Act

[53] The Board's reasoning on this issue is contained in both its decision of January 18, 2005 and its decision of January 4, 2006. That reasoning can be summarized as follows.

[54] First, the Board dealt with the Unions' submission that to the extent the Regulation directly affected the Act, it was beyond the competence of the Lieutenant Governor in Council. As summarized by the Board, the essence of this submission was "*The will of the Legislature is expressed in statutes and is supreme. It cannot be undermined or contradicted by executive regulation*".[22] The Board accepted that "*as an abstract principle, this seems fairly straightforward*".[23] However, it did not go on to deal with this argument as it found that the Regulation did not purport to directly affect anything in the Act. The Board found that the provisions of the Regulation could be reconciled with the continuation of the Board's ability to exercise its jurisdiction under Section 1(4) of the Act.

[55] In this regard, the Board made a distinction between Section 69 and Section 1(4) of the Act. In Section 13 of the P.S.L.R.T.A. the Legislature specifically states that Section 69 of the Act does not apply when a district school board assumes the jurisdiction of two or more old boards.

[56] As already indicated, Section 69 is the provision of the Act that deals with "*successor employer*" applications and what happens to the bargaining rights of a union when the employer with whom they have a collective agreement is sold or disposed of in any way. Section 69 reads as follows:

> *69. (1) In this section,*
>
> *"business" includes a part or parts thereof; ("entereprise")*
>
> *"sells" includes leases, transfers and any other manner of disposition, and*
>
> *"sold" and "sale" have corresponding meanings. ("vend", "vendu", "vente")*
>
> *(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.*
>
> *(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has*

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[22] [3] Board Decision, January 18, 2005 at para. 11

[23] Ibid., para. 12

given or is entitled to give notice under section 16 or 59, sells his, her or its business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 16 or 59, as the case requires.

(4) Where a business was sold to a person and a trade union or council of trade unions was the bargaining agent of any of the employees in such business or a trade union or council of trade unions is the bargaining agent of the employees in any business carried on by the person to whom the business was sold, and,

(a) any question arises as to what constitutes the like bargaining unit referred to in subsection (3); or

(b) any person, trade union or council of trade unions claims that, by virtue of the operation of subsection (2) or (3), a conflict exists between the bargaining rights of the trade union or council of trade unions that represented the employees of the predecessor employer and the trade union or council of trade unions that represents the employees of the person to whom the business was sold,

the Board may, upon the application of any person, trade union or council of trade unions concerned,

(c) define the composition of the like bargaining unit referred to in subsection (3) with such modification, if any, as the Board considers necessary; and

(d) amend, to such extent as the Board considers necessary, any bargaining unit in any certificate issued to any trade union or any bargaining unit defined in any collective agreement.

(5) The Board may, upon the application of any person, trade union or council of trade unions concerned, made within 60 days after the successor employer referred to in subsection (2) becomes bound by the collective agreement, or within 60 days after the trade union or council of trade unions has given a notice under subsection (3), terminate the bargaining rights of the trade union or council of trade unions bound by the collective agreement or that has given notice, as the case may be, if, in the opinion of the Board, the person to whom the business was sold has changed its character so that it is substantially different from the business of the predecessor employer.

(6) Despite subsections (2) and (3), where a business was sold to person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and the person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

(a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);

(b) determine whether the employees concerned constitute one or more appropriate bargaining units;

(c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in the unit or units; and

(d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

(7) Where a trade union or council of trade unions is declared to be the bargaining agent under subsection (6) and it is not already bound by a collective agreement with the successor employer with respect to the employees for whom it is declared to be the bargaining agent, it is entitled to give to the employer a written notice of its desire to bargain with a view to making a collective agreement, and the notice has the same effect as a notice under section 14.

(8) Before disposing of any application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, or may hold such representation votes, as it considers appropriate.

(9) Where an application is made under this section, an employer is not required, despite the fact that a notice has been given by a trade union or council of trade unions, to bargain with that trade union or council of trade unions concerning the employees to whom the application relates until the Board has disposed of the application and has declared which trade union or council of trade unions, if any, has the right to bargain with the employer on behalf of the employees concerned in the application.

(10) For the purposes of section 7, 63, 65, 67 and 132, a notice given by a trade union or council of trade unions under subsection (3) or a declaration made by the Board under subsection (6) has the same effect as a certification under section 10.

(11) Where one or more municipalities as defined in the Municipal Affairs Act are erected into another municipality, or two or more such municipalities are amalgamated, united or otherwise joined together, or all or part of one such municipality is annexed, attached or added to another such municipality, the employees of the municipalities concerned shall be deemed to have been intermingled, and,

(a) the Board may exercise the like powers as it may exercise under subsections (6) and (8) with respect to the sale of a business under this section;

(b) the new or enlarged municipality has the like rights and obligations as a person to whom a business is sold under this section and who intermingles the employees of two of the person's businesses; and

> *(c) any trade union or council of trade unions concerned has the like rights and obligations as it would have in the case of the intermingling of employees in two or more businesses under this section.*
>
> *(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.*
>
> *(13) Where, on an application under this section, a trade union alleges that the sale of a business has occurred, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.*

[57] Under the P.S.L.R.T.A. the Legislature set up a separate scheme for determining successor rights and, in doing so, made it clear that the scheme set out in Section 69 of the Act did not apply. As put by the Board at para. 16 of its decision of January 18, 2005:

> *Thus, for the purposes of the P.S.L.R.T.A., the Greater Essex Board is a "successor" to the Windsor Board. Pursuant to Section 14, the Union continues to represent the "like bargaining unit", and the provincial collective agreement continues to apply. To the extent that the Unions rely on the P.S.L.R.T.A. as the source of their bargaining relationship with the Greater Essex Board, that relationship is circumscribed by the limitations contained in the P.S.L.R.T.A. and regulations thereunder, in this case geographic.*

[58] However, under the Act, the Board also has jurisdiction to rule on bargaining rights pursuant to Section 1(4) of the Act if there are two or more entities that carry on related activities whether or not simultaneously, under common control or direction. Section 1(4) provides:

> *1(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.*

[59] Unlike Section 69, Section 1(4) of the Act is not referred to in the P.S.L.R.T.A.. As pointed out by the Board, while Sections 69 and 1(4) of the Act may often apply to the same fact situations, the respective scope of the provisions is not identical. In making this point, the Board cites its decision in Harley Transport Limited,[24] where it said as follows:

> *13. ... with the amendment of section 1(4) in 1975, it became possible that both section 63* [the predecessor of section 69] *and section 1(4) could be applicable to the same fact situation. The variety of transactions and*

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[24] [1984] O.L.R.B. Rep. Oct. 1433

> *business arrangements which have been found to be a "sale" within the meaning of section 63 could also entail a sufficient retention of ongoing control over the business activities to bring into play section 1(4). We note in passing that even prior to section 1(4) being amended to apply to serial or sequential control or ownership, the Board had found section 63 and section 1(4) to be simultaneously applicable to the same fact situation. It is fair to say that both sections can only have simultaneous application if all or part of a "business" is involved. Where a partial change has occurred in the ownership or control of an operation, the Board has generally applied section 63 where there is proof that a "severable, coherent and independent" operation or part of a going concern has been transferred or that a "discrete, cohesive portion of the economic organization or activities" which comprise the totality of the business has been severed or transferred. Where the partial change does not satisfy the requirements of section 63, section 1(4) may still apply if there is sufficient retention of control over the core functions of an operation.* (cites omitted)

[60] Thus, under the Act, the focus of Section 1(4) as opposed to Section 69, is on "*the retention of control over the core functions of an operation*". As noted by the Board, there are situations where Section 69 would not apply and Section 1(4) would.

[61] The question before the Board was whether by virtue of the P.S.L.R.T.A. and particularly the Regulation, the Legislature had removed or replaced the powers of the Board under Section 1(4) of the Act. In coming to the conclusion that they had not, the Board found:

1. That neither the P.S.L.R.T.A. nor the Regulation make any reference to Section 1(4).

> 2. That while section 39 of the Act contemplates that the Lieutenant Governor in Council has the power to pass regulations that "*override the will of the Legislature*" as expressed in another statute, sections 40(1)(c) and 40(3) of the P.S.L.R.T.A., the sections that actually govern the regulation-making power under the P.S.L.R.T.A., limit *the effect of such regulations to the operation of the P.S.L.R.T.A.. That is, nothing in the regulations promulgated under the authority of section 40 can apply to vary or contradict another statute. Section 40 simply does not give the Lieutenant Governor in Council the power to promulgate such a regulation.*[25]

[62] The Board's decision of January 18, 2005 also deals with this point as follows:

> ... *the Regulation in this case does not purport to affect directly anything in the L.R.A.*[the Labour Relations Act]. *It is promulgated under a section of the P.S.L.R.T.A., Section 40, by which the Legislature delegated authority to the Lieutenant Governor in Council to make regulations about "how this Act applies with respect to employees of a predecessor employer who performed construction work". It does that. On its face, it says nothing about the L.R.A.. Despite Section 39(1) and its*

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[25] Board decision, January 4, 2006 at para. 9

> *"regulations", the Regulation is promulgated under Section 40(1) and 40(3), all of which refer only to this "Act" (i.e. the P.S.L.R.T.A.)*[26].

[63] The Board did comment on the question of why the Legislature chose not to refer to Section 1(4) of the Act in the P.S.L.R.T.A.. It did so as follows:

> *It is indeed odd that the P.S.L.R.T.A. carefully excludes the effect of Section 69 of the Act, but makes no reference to subsection 1(4). The reasons for that are purely matters of speculation on my part. However, when deciding whether or not to exercise a discretion under subsection 1(4) of the Labour Relations Act, 1995, the Board must do so with respect to factors which are relevant to the aims and objectives of the Labour Relations Act, 1995, rather than to some other statute which by its very terms does not apply to or vary subsection 1(4) of the Act. It would be entirely inappropriate for me to speculate about why there is no reference to subsection 1(4) in the P.S.L.R.T.A.. Perhaps the draftsperson overlooked that issue. Perhaps the draftsperson was perfectly aware of the Board's jurisprudence with respect to subsection 1(4) (indeed, that is a proper assumption to make in interpreting a statute): see Sullivan and Dreiger on The Construction of Statues (4th ed.) Sullivan, (Butterworths Toronto: 2002) at pp 154-5 and 2747-3174 Québec Inc. v. Québec 1996 CanLII 153 (S.C.C.), [1996] 3 S.C.R. 919. To speculate on, and to give weight to, my guess as to certain policy directives under the P.S.L.R.T.A. not contained in the statute would be an improper exercise of a discretion, which is confined exclusively to the operation of the Labour Relations Act, 1995. Policy initiatives on the part of the Legislature are expressed in statute, and it is not appropriate for the Board to substitute its belief about what the Legislature might have intended had it addressed the issue before it (assuming, of course, that it did not do so).*[6]

[64] The Applicant contends that there is conflict or inconsistency between section 40 of the P.S.L.R.T.A. as qualified by the Regulation and section 1(4) of the Act, such that section 39(1) of the P.S.L.R.T.A. applies with the result that the declaration made by the Board pursuant to section 1(4) of the Act should be quashed.

[65] The basis for the position taken by the Applicant is as follows.

[66] In paragraph 53 of its decision dated January 4, 2006, the Board granted a declaration that the Windsor Board and the Applicant are one employer for all purposes of the Act. Accordingly, under the Act, by reason of section 1(4) and the decision of the Board dated January 4, 2006, the Applicant is bound by the province-wide collective agreements of the Windsor Board, but without the geographic restriction that is effective under the P.S.L.R.T.A..

[67] Since the P.S.L.R.T.A. on the one hand, applies so as to bind the Applicant to the collective agreements only on a geographically restricted basis and the Act, on the other hand, applies so as to bind the Applicant to the collective agreements without that geographic restriction, there is a *prima facie* "conflict or inconsistency" between the P.S.L.R.T.A. and the Act in this regard, within the meaning of section 39 of the P.S.L.R.T.A.. In simple terms, the

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[26] para. 12

[6] Board decision, January 4, 2006 para. 52

P.S.L.R.T.A. expressly *permits* the Applicant to do what the declaration under section 1(4) of the Act *prevents* the Applicant from doing. Unless there are proper reasons to the contrary, the result under section 39 would be that the manner in which the P.S.L.R.T.A. applies must prevail over the different and conflicting manner in which the Act applies.

[68] It was submitted for the Respondent Unions that there is no "contradiction" between the P.S.L.R.T.A. and the Act because all that the P.S.L.R.T.A. does is to put in place a regime for "successor rights" in substitution for section 69 of the Act, while the Board's decision of January 4, 2006 was made under the "related employer" provision in section 1(4) of the Act. However, the result of the P.S.L.R.T.A. and the Regulation, on the one hand, and the application of section 1(4) of the Act, on the other hand, is the conflict or inconsistency identified above.

[69] The Board said in paragraph 46 of its decision of January 4, 2006 that it was not obvious that there is conflict between the Regulation and the provision in sections 162 and 163 of the Act relating to provincial collective agreements. Whether this statement is to be taken as denying the existence of the conflict asserted by the Applicant is not clear. The decision of the Board does not otherwise directly deal with whether the alleged conflict is a real conflict for purposes of section 39(1) of the P.S.L.R.T.A..

[70] However, it is evident that the Board considered section 1(4) of the Act and the relevant P.S.L.R.T.A. provisions which replace section 69 of the Act, to be dealing with two different matters, as discussed above in these reasons: "continuity of control", in the case of section 1(4) of the Act and "sale" of a "business" in the case of the P.S.L.R.T.A..

[71] Taking this difference into account, it could be argued that while the results that flow from the application of section 1(4) and those flowing from the P.S.L.R.T.A. are different and apparently incompatible, that does not constitute a "conflict or inconsistency" for purposes of section 39(1) of the P.S.L.R.T.A. because the different results flow from provisions directed to different circumstances and not from provisions which are in conflict with each other in respect of their terms. Put simply, there may be a conflict in results, but there is no conflict in terms, and therefore section 39(1) has no application. This distinction might be contended to be incorrect, but no basis is evident for regarding it as patently unreasonable.

[72] In coming to the decision it did, the Board sought to find an interpretation that avoided a conflict between the Regulation and s.1(4) of the Act. In doing so, it strictly and narrowly construed the effect of the Regulation and of s.39(1) of the P.S.L.R.T.A..

[73] Section 39(1) of the P.S.L.R.T.A. and others like it where the Legislature delegates to the Executive the discretionary power to overrule by regulation the provisions of an enabling statute or another statute have been dubbed "*Henry VIII clauses*", allegedly named "*in disrespectful commemoration of that monarch's tendency to absolution* (sic)".[28]

[74] Henry VIII clauses have been the subject of controversy and comment, both in Canada and in England. The comments by A. Campbell J. in Ontario Public School Boards' Assn. v. Ontario (Attorney General) [29]"represent a forceful articulation of the constitutional concern they

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[28] Rt. Hon. The Lord Rippon of Hexam Q.C., "Henry VIII clauses" (1989) 10 Statute L. Rev. 205.

[29] [1997] O.J. No. 3184

raise. In that case, Campbell J. dealt with a provision of the Fewer School Boards Act[30], passed at the same time as the P.S.L.R.T.A., whose wording mirrors that of s.39(1). In doing so, he first observed that:

> *This is the opposite of the usual rule, that if there is any conflict between the statute and the regulation which relies for its authority on the statute, the statute enacted by the Legislative Assembly prevails over the regulation made by the government. The usual rule is that legislative power is vested in the democratically elected Legislature to make laws after full public debate. This provision reverses that rule.*[31]

Campbell J. then went on to articulate the following concern:

> *This power is constitutionally suspect because it confers upon the government the unprotected authority to pull itself up by its own legal bootstraps and override arbitrarily, with no further advice from the Legislative Assembly, and no right to be heard by those who may be adversely affected by the change, the very legislative instrument from which the government derives its legal authority.*[32]

[75] According to Campbell J., this power was never used by the Ontario legislature until the early 1990's. Until that time, it had been considered by the government "*and successive generations of Crown law officers to be repugnant to our basic traditions of public accountability.*"[33]

[76] In the words of Campbell J., "*however offensive*" this power may be "*to our traditional sense of legality and public accountability*"[34], the constitutional capacity of legislative bodies to confer the power has been upheld by the Supreme Court of Canada in Re Gray (Grey).[35] In Re Gray, the Supreme Court of Canada was dealing with the constitutional validity of a section of the "*War Measures Act, 1914*" that provided that Cabinet would have the power to do what was necessary or advisable by regulation or order, "*for the security, defence, peace order and welfare of Canada*" by reason of the "*existence of real or apprehended war...*". With two judges dissenting on the basis that such a "*wholesale surrender of the will of the people to any autocratic power is exactly what we are fighting against*"[36], the majority of the Court upheld the constitutional validity of this broad delegation of authority by the Legislative branch of government to the executive.

[77] In Re Gray, Mr. Grey had, pursuant to the Military Service Act, 1917, been granted exemption from military service. In April of 1918, the Governor-in-Council passed a regulation canceling Mr. Grey's exemption. The Regulation was passed pursuant to the broad powers

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[30] S.O. 1997, c. 3.

[31] para. 45

[32] para. 47

[33] para. 49

[34] Ibid. para. 50

[35] (1918), 57 S.C.R. 150

[36] per Idington J. at 165

granted to Cabinet under the War Measures Act, 1914. The regulations were put before Parliament for approval.

[78] The majority of the Court in Re Gray considered and dismissed the submission that the power to make regulations cannot

> *constitutionally be granted to such an extent as to enable the express provisions of a statute to be amended or repealed; that under the constitution parliament alone is to make laws, the Governor-in-Council to execute them, and the court to interpret them; that it follows that no one of these fundamental branches of government can constitutionally either delegate or accept the function of any other branch.*[37]

[79] A review of the reasoning in Re Gray makes it clear that the fact that the country was at war was at the forefront of the Court's mind when it considered the question before them. In the words of Justice Anglin:

> *Again, it is contended that should section 6 of the War Measures Act be construed as urged by counsel for the Crown, the powers conferred by it are so wide that they involve serious danger to our parliamentary institutions. With such a matter of policy we are not concerned. The exercise of legislative functions such as those here in question by the Governor-in-Council rather than by parliament is no doubt something to be avoided as far as possible. But we are all living in extraordinary times which necessitate the taking of extraordinary measures.*[38]

[80] As Justice Campbell noted:

> *It is one thing to confer this extraordinary power if it is actually needed for some urgent and immediate action to protect an explicitly identified public interest. It is quite another thing to hand it out with the daily rations of government power, unlimited as to any explicit legal purpose for which it may be exercised.*[39]

[81] Re Gray was recently discussed by the Ontario Court of Appeal in R. v. P.(J.)[40]. In that case the Court was not dealing with a Henry VIII clause. Rather, the question was whether the executive could, by regulation, limit or provide an exemption for the crime of possession of marijuana set out in s.4 of the Controlled Drugs and Substances Act ("C.D.S.A."). In holding that they could, the Court of Appeal noted that s.55(1) of the C.D.S.A. specifically provides that the Governor-in-Council could make regulations "*governing, controlling, limiting, authorizing ... possession or obtaining of or other dealing in any controlled substance*". In dealing with the question before them the Court relied on Re Gray in support of the principle that while Parliament cannot

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[37] per Sir Charles Fitzpatrick C.J. at 156-157

[38] at 181-182

[39] Ontario Public School Boards Association, supra at para. 52

[40] (2003), 67 O.R. (3d) 321

> *abdicate its functions, it can, within reasonable limits, delegate its powers to the executive. Such powers must necessarily be subject to determination at any time by Parliament, and needless to say the acts of the executive under its delegated authority, must fall within the ambit of the legislative pronouncement by which its authority is measured.*[41]

In R. v. P.(J.), the enabling legislation clearly delegated the impugned power to the executive.

[82] In Brantford (City) Public Utilities Commission v. Brantford (City)[42] Kent J. dealt with a Henry VIII situation and upheld a regulation that conflicted with a statutory provision. Specifically, the Public Utilities Act permitted a municipality to create or dissolve a Public Utilities Commission. The provincial government then amended the Municipal Act and in that Act provided that "*despite any Act*" the Minister of Municipal Affairs could make regulations, including a regulation providing that a municipality did not have the power to dissolve a local board specified in the regulation. The Minister then passed a regulation specifying that a municipality did not have the power to dissolve certain local boards, one of which was a Public Utility Commission established under the Public Utilities Act or any other Act which is responsible for the distribution and supply of electric power or energy. Pursuant to the Public Utilities Act, the City of Brantford's municipal council approved a resolution that the City would dissolve the existing Public Utilities Commission to create an appointed Hydro-Electric Commission pursuant to the Power Corporation Act. The Public Utilities Commission moved for an injunction and a declaration that the City did not have the jurisdiction to dissolve them, given the provisions of the Municipal Act and the regulations made thereunder. Kent J. granted the relief sought, finding that the regulation and its enabling legislation "*were created with the intention of effectively repealing the prior existing statute*". In that case the enabling legislation specifically addressed the fact that the Minister could make regulations prohibiting a municipality from dissolving a local board.

[83] Unlike in R. v. P.(J.) and Brantford, there is no clear delegation in the enabling legislation at issue in this case the (P.S.L.R.T.A.), that the Minister may make regulations removing the power of the Board to grant a sole employer declaration pursuant to the provisions of s.1(4) of the Act. The question then becomes whether the Board was patently unreasonable when it failed to interpret s.39(1) broadly enough to imply such a delegation.

[84] In Britnell v. Secretary of State for Social Security [43] Lord Keith of Kinkel, who wrote the reasons that the other members of the House of Lords agreed with, endorsed a previous judicial pronouncement that "a *power to modify the provisions of a statute should be narrowly and strictly construed*"[44]

[85] In Thoburn v. Sunderland City Council[45] the High Court of Justice, Queen's Bench Division, Divisional Court considered the use of a Henry VIII clause in the European Communities Act, 1972, a law that was passed in Britain to give effect domestically to the policies of the European Union. Lord Justice Laws, who wrote the opinion that the other judges

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[41] para. 20

[42] (1996), 31 O.R. (3d) 465 (Ont. Gen. Div.)

[43] [1991] 2 All E.R. 726

[44] para. 32

[45] [2002] E.W.J. No. 652

concurred with, found that Parliament could delegate the power to amend primary legislation. However, he also acknowledged and did not disagree with the jurisprudence concerning the narrow construction to be given to such clauses. In doing so, he referred to the decision in Orange Personal Communications Ltd.[46] where Sullivan J. stated at p. 177:

> *Parliament does not lightly take the exceptional course of delegating to the executive the power to amend primary legislation. When it does so the enabling power should be scrutinized, should not receive anything but a narrow and strict construction and any doubts about its scope should be resolved by a restrictive approach.*

[86] In Friends of the Oldman River Society v. Canada (Minister of Transport)[47] LaForest J. reviewed the principles of law applicable to the interpretation of an apparent conflict between a statute and subordinate legislation. Unless a statute authorizes it, subordinate legislation cannot conflict with either parent legislation or other acts of Parliament. Where subordinate legislation is said to be inconsistent with another act of Parliament, "*there is a presumption that the legislature did not intend to make or empower the making of contradictory enactments*".[48] Thus, where possible, a court is to prefer an interpretation that avoids a finding of conflict.

[87] While not determinative of the issue before the Board, the principles that emerge from these cases are useful in assessing whether the Board's conclusion regarding the alleged conflict between the Regulation and Section 1(4) of the Act was a patently unreasonable one. Section 39(1) of the P.S.L.R.T.A. is a broad and open-ended clause. It is also not a clause that delegates the authority to make regulations. That power is contained in Section 40. In these circumstances the Board chose an interpretation that focused on the express power delegated in Section 40 and arrived at a conclusion that avoided a finding of conflict between the Regulation and Section 1(4) of the Act. In doing so, it narrowly restricted the power of subordinate legislation passed under the P.S.L.R.T.A. to modify or repeal the provisions of the Act.

[88] The Board's decision cannot be said to defeat the purposes of the P.S.L.R.T.A.. These purposes are set out in Section 1 which reads:

> *1. The following are the purposes of this Act:*
>
> *1. to encourage best practices that ensure the delivery of quality and effective public services that are affordable for taxpayers;*
>
> *2. to facilitate the establishment of effective and rationalized bargaining unit structures in restructured broader public sector organizations;*
>
> *3. to facilitate collective bargaining between employers and trade unions that are the freely designated representatives*

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[46] [2001] Eu. L.R. 165, [2000] E.W.J. No. 5820 (High Court of Justic, Queen's Bench Division (England & Wales)

[47] [1992] 1 S.C.R. 3 at p. 22

[48] para. 42

> *of the employees following restructuring in the broader public sector in other specified circumstances;*
>
> 4. *to foster the prompt resolution of workplace disputes arising from restructuring.*

[89] There is nothing in the above purposes that is inconsistent with the Board having discretion under Section 1(4) of the Act. Further the Board's interpretation of the provisions of the P.S.L.R.T.A., the Regulation and their relationship cannot be said to render any of the provisions being dealt with meaningless. For example, if the majority of the trustees elected to the Applicant's Board had been elected by electors from the geographic jurisdiction of the former Essex County Board, then, on the reasoning of the Board, pursuant to the provisions of the P.S.L.R.T.A. and the Regulation, the geographic scope of the collective agreement would have been limited to the City of Windsor. One of the necessary preconditions for the exercise of discretion under Section 1(4) of the Act (common control) would not have existed.

[90] The question this Court has to ask itself is whether the Board's conclusion was "*clearly irrational*" or almost bordering "*on the absurd*". Applying this strict test, the Applicant has failed to demonstrate that the necessary threshold has been met. The Board's approach to the problem and their restrictive interpretation of the effect of the Regulation might not be the correct one. However, it is not clearly irrational or almost absurd.

The Board's Decision Under Section 1(4)

[91] Section 1(4) of the Act was enacted in 1971 and amended in 1975. As already indicated, it provides as follows:

> 1(4) *Where, in the opinion of the Board, associated or related activities or business are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.*

[92] According to the Board, Section 1(4) sets out four preconditions to the exercise of the Board's discretion to make a single employer declaration:

1) that there be two or more entities;

2) that they carry on associated or related businesses or activities;

3) whether or not simultaneously;

4) under common direction or control.

[93] The Board found that each of these statutory preconditions were present in this case.

1) They found that there were two or more entities, the Windsor Board and the Greater Essex Board (the Applicant). In Section 1(4) "*entities*" are defined as "*corporations, individuals, firms, syndicates, associations or any combination thereof*". While the Board acknowledged that "*These words suggest a commercial enterprise, they are not so strictly limited, and the Board has applied it to virtually any employer, particularly those in the greater public sector*"[49] The Applicant challenged this finding as "*simply untenable*", arguing that the "*Windsor Board and the Applicant are school boards, statutorily created, statutorily governed and statutorily limited*". While this is undoubtedly true, that does not mean that they are not also subject to the provisions of the Act. The Applicant provided no authority to challenge the Board's finding that the Board has applied Section 1(4) to virtually any employer, particularly those in the greater public sector. Thus, there is no basis for this Court to conclude that that finding was patently unreasonable.

2) The Board found that the Applicant and the Windsor Board carried on associated or related businesses or activities. "*In fact, they carry on the same business that the Windsor Board carried on before January 1, 1998*"[50]. The Applicant argued that this conclusion was also wrong. As put by the Applicant "*Simply stated, the school boards are not businesses*". Again, Section 1(4) uses the phrase "*related businesses or activities*" (emphasis added). Thus, while it may be arguable that the Applicant and the Windsor Board did not carry on related "*businesses*", this does not mean that they did not carry on related "*activities*".

3) The Board found that the section specifically provided that the two entities in question did not have to carry on their activities simultaneously. In doing so, they dealt with the same submission that the Applicant made before this Court on this finding as follows:

> *Counsel for the Greater Essex Board argued that while the activities need not be carried out simultaneously, the two entities must exist for at least some period of time contemporaneously. I do not accept that argument. It was precisely because the section was ineffective if one business was wound up before the other was started that the Act was amended in 1975 to include the phrase "whether or not simultaneously". Indeed, the Board has found that subsection 1(4) might, on the proper facts, apply to the relationship between corporations, some of which had been wound up and dissolved prior to the formation of the others. See Brie Construction Inc., [2002] O.L.R.B. Rep. Sept./Oct. 818*[51]

On the application for judicial review, the Applicant provided no authority that would indicate that the Board's reasoning on this point was incorrect, let alone patently unreasonable.

4) The Board also found that the Windsor Board and the Greater Essex Board were under common control and direction. There is no definition of "control or direction" in the Act. The Applicant argued that this conclusion "*was perverse to the evidence. The evidence was that, in fact, the Windsor Board, when it existed immediately prior to January 1, 1998, was governed by an elected Board of Trustees which was different than the elected Board of Trustees which governed the operations of the Applicant upon its creation effective January 1, 1998*".

As summarized by the Board, the evidence before it was that before January 1, 1998, the Windsor Board and the Essex Board were governed by elected trustees. After January 1, 1998, the

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[49] Board decision January 4, 2006 para. 37
[50] Board decision January 4, 2006 para. 38
[51] Board decision January 4, 2006 para. 39

Applicant was governed by a board of ten trustees, six of whom were elected by the electors of the City of Windsor.[52] On the basis of this evidence the Board found as follows:

> *The commonality of the control or direction need not be entirely co-extensive. If one source of control has meaningful, if not exclusive, control over both of the entities, that level of control satisfies the requirements of the subsection. In this case, the ultimate control is with the electors of the City of Windsor. They elected all of the trustees of the Windsor Board and they elected the majority of the trustees of the Greater Essex Board. In this case, the ultimate source of control has, in fact, ultimate control over both bodies.*[53]

This conclusion gives a very expansive meaning to control or direction but, given the evidence, it was not patently unreasonable.

[94] Once it determined that the four preconditions were satisfied, the Board went on to consider whether it should exercise its discretion under section 1(4) to grant relief. While recognizing that a court is generally reluctant to intervene where the exercise of a tribunal's discretion is being reviewed, the Applicant argued that, in this instance, the Board ignored its own established jurisprudence to such a degree as to amount to an abuse of its discretion.

[95] A review of the Board's jurisprudence on the issue of the criteria the Board used in determining whether to exercise its discretion under Section 1(4) reveals the following:

> 1. One of the significant purposes of Section 1(4) is to guard against the dilution, erosion or undermining of bargaining rights that have already been obtained.[54]
>
> 2. The Board has refused to exercise its discretion where it has determined that the Union is seeking to acquire bargaining rights in order to avoid the certification procedures of the Act.
>
> 3. The other criteria that the Board will consider are:
>
> a) whether a declaration will disturb existing bargaining rights;
>
> b) whether a declaration would interfere with the interests and rights of employees to select their own bargaining representative or to remain unrepresented; and
>
> c) whether the application has been made within a reasonable time after the applicant becomes or with reasonable diligence, should have become aware that the two or more entities were closely related.[55]

[96] With respect to these established criteria the Applicant submits that there was no reason to issue the declaration requested as there was no risk of erosion of bargaining rights. The Unions had precisely what they had before January 1, 1998 and the creation of the Applicant – a

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[52] Board decision January 4, 2006 at para. 22

[53] Board decision January 4, 2006 para. 40

[54] Donald A. Foley Ltd. [1980] O.L.R.B. Rep. April 436

[55] John Hayman and Sons Co. Ltd., [1984] O.L.R.B. Rep. June 822; Evans-Kennedy Construction Ltd. [1979] O.L.R.B. Rep. May 388

collective agreement that covered the City of Windsor. In dealing with this submission the Board first pointed out that the argument "*equated the legal rights and responsibilities under the collective agreement with its practical application*".[56] In this case the Unions, by virtue of the Act have provincial collective agreements that are province-wide in scope. Before January 1, 1998 these agreements only affected construction work done in the City of Windsor because the employer with whom they had these agreements, the Windsor Board, only did construction work in the City of Windsor. If that employer had done construction work elsewhere, for example, by annexing an adjacent township so that the size of the geographic area served by that Board had changed, then the collective agreements would have applied to that expanded geographic area without the need for any application under the Act. As put by the Board:

> *The fact that this increase in the size of the area under the control of the Board of Education was (for reasons entirely unrelated to labour relations) effected by the creation of a new entity, is precisely the kind of fact situation to which subsection 1(4) applies.*[57]
>
> In making this statement the Board was referring to its jurisprudence that has established that a union's bargaining rights can be eroded when that union loses the opportunity to participate in the growth of particular enterprise.[58] As put by the Board "*the fact that the expansion was one properly effected under the Fewer School Boards Act and the P.S.L.R.T.A. does not change this analysis for the purpose of the Labour Relations Act, 1995*".[59]

[97] The Applicant also argues that issuing a declaration under Section 1(4) amounts to allowing the Unions to appropriate work opportunities that they had not earned by making an application for certification. When dealing with the same submission the Board stated:

> *The Board has often said that subsection 1(4) is concerned with the effect of changes in the structure of an employer, not with questions of propriety or morality in the manner in which a trade union seeks to utilize the Act to defend its bargaining rights. Both subsection 1(4) and an application for certification are ways of acquiring bargaining rights and neither is more appropriate nor statutorily superior to the other: see eg. KNK Ltd. [1991] O.L.R.B. Rep. Feb. 209; and E.S. Fox Ltd. [1991] O.L.R.B. Rep. July 819. There are no employees of the former Essex Board or the current Greater Essex Board who would be affected by the declaration.*[60]

[98] Thus, this is not a case where the Board found that there were employees of an existing business who had an established business relationship without a union and who may not wish to be represented by a union. In these types of situations, the Board has refused to exercise its discretion under Section 1(4) because of a concern that the Union is seeking to use Section 1(4) to avoid the certification procedures under the Act.[61]

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[56] Board decision January 4, 2006 para. 42

[57] Board decision January 4, 2006 para. 43

[58] Brinks Canada Ltd., [1987] O.L.R.B. Rep. May 647; Milton Hydro-Electric Commission [2002] O.L.R.B. Rep. July/Aug. 701

[59] Board decision January 4, 2006 at para. 43

[60] Ibid para. 44

[61] See Capricorn Acoustics & Drywall Ltd. [1986] O.L.R.B. Rep. Mar. 308

[99] Connected to this concern is the issue of delay. As articulated by the Board in Evans-Kennedy Construction Limited[62], if an employer, based on an understanding of its rights, builds up a non-union workforce then, unless the union acts promptly to secure its bargaining rights, the Board may decline to apply Section 1(4) and indicate to the union that if it desires bargaining rights for the non-union employees it should seek to obtain them through the regular certification procedures.

[100] In this case, the Applicant submits that the Unions, by waiting until 2004, had acquiesced in the Applicant's belief that the P.S.L.R.T.A. confined the scope of the provincial collective agreements to the geographic boundaries of the former City of Windsor. When dealing with this submission, the Board found that there were no facts to support the position that before 2004 there was any situation in which the Greater Essex Board contracted out work to a contractor not bound to a collective agreement in the County of Essex of which the Unions knew or ought to have known.[63] Therefore, the Board found no basis to draw the inference that the Unions knew the Applicant's point of view and let the Applicant act upon it without doing anything.

[101] In support of their submission on acquiescence, the Applicant also points to the collective agreements that the Applicant negotiated with the Unions after January 1, 1998. Those agreements essentially confirmed that the members of the Respondent Unions would do all labour work (except certain maintenance work) on the current and new properties within the geographic jurisdiction of the former Windsor Board. The Applicant argues that these collective agreements provide evidence that the Unions had accepted the Applicant's view as to the effect of the P.S.L.R.T.A. on the geographic scope of the provincial collective agreements.

[102] The Board heard and rejected this submission by the Applicant. In doing so, it found that the collective agreements negotiated by the parties after January 1, 1998 did nothing more than acknowledge the provisions of the P.S.L.R.T.A.. They did not address the construction provisions of the Act and they were not negotiated in accordance with the construction provisions of the Act. Further, the Board found that there was no evidence before it that the scope of the provincial agreements was ever discussed between the parties or that there was ever an occasion on which the Unions were asked or obliged to set forth their position. The Board also found that the evidence before it was that the Unions took action on the first occasion when there was evidence that the provincial collective agreements had been violated. Therefore, the Board concluded that there was nothing in the Unions' conduct that would cause it to refuse to exercise its discretion under Section 1(4).

[103] The last question the Board addressed was the issue of the date as of which the order should have effect. The Board made the declaration effective as of the date the Applicant came into existence. In doing so, it acted in accordance with its own jurisprudence that provides that, absent a specific finding that this should not be the case, the wording of the statute is such that a declaration under Section 1(4) has effect from the date the associated or related activities commenced.[64] The Applicant submits that the Unions' delay constituted a good reason why a specific finding should be made in this case that the declaration should be effective as of the date

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[62] Supra, relied on in Brinks Canada, supra.

[63] Board decision, January 4, 2006 para. 45

[64] JDS Investments Ltd. [1981] O.L.R.B. Rep. Mar. 294

it was given. The Board disagreed and, for the reasons given when it chose to exercise its discretion and grant a declaration, found that "*in this case I have no evidence of delay or any deliberate lulling of the Greater Essex Board into a belief that the Unions did not share their view of the effect of the P.S.L.R.T.A. or provincial collective agreements*".[65]

[104] This review of the reasoning of the Board on the issue of whether it should exercise its discretion and make a declaration under Section 1(4) and on the issue of the effective date of that declaration does not demonstrate either that, in coming to the conclusion it did, the Board ignored its own established jurisprudence or, more significantly, that that conclusion was patently unreasonable, producing a result bordering on the absurd. Given this, there is no basis for a reviewing court to interfere with the Board's decision.

CONCLUSION

[105] For the above reasons, I would dismiss the application. Failing agreement on the question of costs, we may be spoken to.

CARNWATH J.: (Dissenting)

[106] I agree with the material contained in the Overview and Factual Background in Sachs J.'s reasons. I agree that the standard of review is patently unreasonable. I agree with the analysis of patent unreasonableness. However, I regret I cannot agree with my colleagues' ultimate conclusion. With respect, I find the decision of the Board patently unreasonable.

[107] In the short reasons which follow, I hope to identify several points which the Board chose to ignore or failed, in my respectful view, to adequately explain away. Their cumulative effect compels me to conclude the decision is patently unreasonable.

The Purpose of the *P.S.L.R.T.A.*

[108] As Sachs J. has noted in para. [8] of her reasons, the purpose of the *P.S.L.R.T.A.* was: . . .

> 2. To facilitate the establishment of effective and rationalized bargaining unit structures in restructured broader public sector organizations.
>
> 3. To facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees following restructuring in the broader public sector and in other specified circumstances. . . .

[109] I point out that the effect of the Board's decision is to *deny*, not facilitate, collective bargaining in the geographical area of the former Essex Board. The construction employees of that geographical area cannot "freely designate" their trade unions. The right to bargain collectively is foreclosed by the Board's decision.

The Effect of the Board's Decision

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[65] Board decision, January 4, 2006 para. 51

[110] I submit it is clear the government recognized the implications of merging two school boards where one board was subject to a collective agreement applied province-wide, and the other was not. This explains the making of O.Reg. 457/97 (para. [14] in Sachs J.'s reasons). There is no other logical explanation for the action the government took in making the Regulation. The Board's decision ignores the obvious intention of the *Act* and Regulation and turns it on its head. What else explains the existence of the Regulation other than the intention to limit the province-wide bargaining rights to the geographical area of the City of Windsor following merger?

The Possibility of Conflict with other Statutes

[111] Recognizing the possibility that the transitional provisions of the *P.S.L.R.T.A.* might conflict or be inconsistent with other legislation, the *P.S.L.R.T.A.* stipulated:
S. 39(1) In the event of a conflict or inconsistency between this Act or a regulation made under this Act and any other Act, this Act or the regulation prevails.

[112] I pause to note that a more unambiguous statement of governmental intention can hardly be imagined. I note further that the Board's interpretation of s. 1(4) of the *Act* both conflicts and is inconsistent with s. 39(1).

[113] I submit the purpose of s. 1(4) is to protect the bargaining rights of a trade union from being undermined by a change in the structure of an employer. I am unable to identify any trade unions in the geographical area of the former Essex Board whose bargaining rights needed protection. There were no such unions with bargaining rights. The only undermining was the removal of the option for construction workers in the geographical area of the former Essex Board to freely bargain collectively or otherwise as they might choose.

The "Henry VIII" clause

[114] Distasteful as it may be to some commentators and surely as it was to the Board, s. 39(1) is a valid and subsisting provision of the *P.S.L.R.T.A.* I agree with my colleagues that the legislature has the power to delegate to the executive the power to amend primary legislation. I agree that the power must receive a strict and narrow construction. However, the construction placed on s. 39(1) by the Board was so narrow as to render it meaningless.

The Board's restriction of s. 39(1) to the *P.S.L.R.T.A.*

[115] The Board stressed that s. 40(1) of the *P.S.L.R.T.A.* provides

> 40(1) The Lieutenant Governor in Council may make regulations …
>
> (b) governing how the Act applies with respect to employees of a predecessor employer who perform construction work and who, immediately before the changeover date, are in a bargaining unit in respect to which a construction union has bargaining rights; …
>
> (3) A regulation under clause (b) may,
>
> (a) vary the application of this Act;

(b) prescribe provisions to operate in place of any part of this Act; and

(c) prescribe provisions to operate in addition to this Act.

[116] The Board's reading of s. 40(1) restricts the LGIC's regulation-making power so as to apply only to the *P.S.L.R.T.A.* Therefore, says the Board, s. 39(1) does not extend to prevent the application of s. 1(4) of the *Act*. In order to come to this conclusion, the Board was required to ignore three things:

> (1) The plain and unambiguous language of s. 39(1) of the *P.S.L.R.T.A.*;
>
> (2) The fact that O. Reg. 457/97 did apply to those employees in the Windsor Board by making it clear their bargaining rights did not extend to the geographical area of the Essex Board following merger; and,
>
> (3) The existence of ss. 40(3)(c) which says that the LGIC may make regulations prescribing provisions to operate *in addition to this Act*.

Section 1(4) of the *Act* does not apply in any event

[117] Section 1(4) sets out four pre-conditions to the exercise of the Board's discretion to make a single employer declaration:

> 1) that there be two or more entities;
>
> 2) that they carry on associated or related businesses or activities;
>
> 3) whether or not simultaneously;
>
> 4) under common direction or control.

[118] For section 1(4) to apply, two main conditions must be satisfied – there must be more than one corporation and they must be under common control. Before January 1, 1998, there were two corporations, but they were not under common control. Windsor voters elected Windsor Board Trustees. Essex voters elected Essex Board Trustees. There was no common control. On January 1, 1998, there was one board – the Greater Essex Board. The Board's reasons, at paras. 37, 38, 39 and 40 of its decision of January 4, 2006, make it clear the Board found there were two boards on and after January 1, 1998. Such is not the case. The pre-conditions of s. 1(4) can not be met before January 1st, 1998, nor after. With respect, the decision to apply 1(4) is wrong in law.

[119] For the above reasons, I respectfully disagree with my colleagues and find the Board's decision to be patently unreasonable. I would allow the application.

1634-04-R (Court File No. 406/06) Brookfield LePage Johnson Controls Facilities Management Services Ltd. Applicant v.IBEW Construction Council of Ontario, Johnson Controls Ltd., Johnson Controls Nova Scotia U.L.C., Johnson Controls L.P., Johnson

Controls World Services Ltd., Brookfield Management Services and OLRB, Respondents

Construction Industry – Judicial Review – Parties – Related Employer – Sale of Business – Settlement – The Council brought a motion to quash the judicial review, characterizing it as prematurely seeking a review of an interim decision of the Board – In the 69/1(4) application the responding party employers brought a motion to the Board to dismiss the application because of Minutes of Settlement purporting to bind the Council and any of its affiliates from bringing such applications for ten years – The Board found that although the individual who signed the agreement on behalf of Local 586 was also the President of the Council there was no evidence that he had actual or ostensible authority to bind the Council – The Board dismissed the employers' motion and the sale of business/related employer applications continued before the Board, although the hearing on the merits had not yet commenced – The employers filed for judicial review –The court found this to be an exceptional or extraordinary situation that should properly be reviewed prior to the Board dealing with the merits – The court also assisted the parties in providing affidavit evidence to reflect the evidence that was before the Board

Superior Court of Justice (Divisional Court), Cumming J., February 13, 2007.

CUMMING J:

The Motion

[1] The Respondent IBEW Construction Council of Ontario (the "Council") moves to quash an application for judicial review (presently scheduled for March 2, 2007) by the Applicant Brookfield Lepage Johnson Controls Facilities Management Services Ltd. ("Brookfield LJ") on behalf of the five corporate Respondents.

[2] The Respondents Johnson Controls Ltd ("Johnson C"), Johnson Controls Nova Scotia U.L.C. ("Johnson N.S."), Johnson Controls L.P. ("Johnson LP"), Johnson Controls World Services Ltd. ("Johnson WS") and Brookfield Management Services Ltd. ("Brookfield") are each employers (hereafter, the "employers").

[3] The Council is the designated employee bargaining agency representing 13 locals, including Local 586, of the International Brotherhood of Electrical Workers ("IBEW Union").

Background

[4] Local 586 of the IBEW Union brought two separate proceedings in 1998 against the employers: a grievance and an application to the Ontario Labour Relations Board ("Board"). At issue was whether the employers constituted one employer for the purposes of the *Labour Relations Act, 1995* (the "*Act*") and the collective agreement already in place.

[5] The employers say that negotiations culminated in a consensual resolution of the dispute and resulted in Minutes of Settlement ("Settlement") executed July 7, 1999. As a

result of the Settlement, the 1998 application was discontinued. Reportedly, on two occasions since 1999, Local 586 has initiated proceedings against the employers to enforce the Settlement, with the sanction of the Board.

[6] The employers assert that the Settlement includes in para.7 a prohibition upon the Council filing further proceedings for a ten year period, that is, until January 1, 2009.

[7] The employers assert that contrary to paragraph 7, the Council filed an Application in August, 2004 (the "Current Application") before the Board under s. 69 and/or s. 1(4) of the *Act*. The employers say that the type of proceeding commenced by the Current Application is exactly the type of proceeding expressly contemplated and prohibited by paragraph 7 of the Settlement. The Board agreed to hear a preliminary motion by the employers on this threshold issue.

[8] The Council's position is that it is not bound by the Settlement.

[9] The Board rendered a decision March 6, 2006, upon this preliminary issue, being as to whether the Settlement was binding upon the Council. The Board found that there is an ambiguity in the 1999 Settlement, the Settlement is enforceable as against those parties who have indicated their agreement to it, and that the President of the Council, Ken Scott, had at least the ostensible authority to bind the Council. However, the Board concluded the Settlement was unenforceable as against the Council.

[10] The employers also submitted before the Board that the Current Application is an abuse of process. This issue was not addressed by the Board in its written decision.

The Application for Judicial Review

[11] The employers have applied for Judicial Review of the Board's decision, seeking an order prohibiting the Board from proceeding with the Council's Current Application on the basis that it constitutes a breach of the Settlement and an abuse of process.

The Motion at hand

[12] The application for judicial review deals with the threshold motion and issue determined by the Board, that is, whether the Board properly can proceed to deal with the Current Application on its merits (as found by the Board), or whether the Council is in effect prohibited from proceeding by reason of being bound by the Settlement. In essence, the employers submit that the correct interpretation of the Settlement precludes any consideration of the Current Application on its merits.

[13] Section 7 of the Settlement Agreement reads:

> 7. These Minutes of Settlement will be effective for a period of ten (10) years commencing January 1, 1999. Thereafter, but not before, the Applicant and/or any affiliated bargaining agent of the International Brotherhood of Electrical Workers and the IBEW Construction Council on [sic] Ontario will be free to file related employer/sale of a business

> applications involving one or more of the same parties hereto at the Ontario Labour Relations Board, including filing a new related employer/sale of a business application identical or similar to the one in these Proceedings. Notwithstanding any provisions of these Minutes of Settlement the applicant will be entitled to rely on any and all facts and pleadings in the instant Applications. Both parties agree that they shall carry out the terms of this agreement in good faith in the interpretation and administration of these minutes of settlement.

[14] On its face, para. 7 appears to apply to the Council. First, the Council is named expressly as being bound. Second, Vice-Chair Jesin notes at para 4 of his Decision that the Council is itself an "affiliated bargaining agent" of the bargaining agency (ie. Local 586). Thus, the Council is purportedly also embraced by this term in para. 7 of the Settlement.

[15] A settlement is enforceable against those parties "who have agreed to the settlement" and if put in writing and signed by the parties "or their representatives": s. 96(7) of the *Act*.

[16] There is common ground that at the time of negotiating the Settlement, Mr. Ken Scott was Business Manager of Local 586 and President of the Council. The decision (para. 20) of Vice-Chair Jesin states: "I do not doubt that Mr. Scott, as President of [the Council] had at least the ostensible authority to bind the Council." However, Vice-Chair Jesin noted that Mr. Scott signed the Settlement only in his capacity as President of Local 586. The Council is not a signing party. Nor is the Council a named party in the title of the Settlement. Vice-Chair Jesin noted (para. 21) that

…the evidence did not establish that [the responding employers] were told or even knew that Mr. Scott had any official position with the Council when they entered into the settlement."

[17] Vice-Chair Jesin did not find there was apparent authority on behalf of Mr. Scott to bind the Council under contract law, as the agent on behalf of a principal ie. the Council. (It is implicit to Vice-Chair Jesin's decision that he found that Mr. Scott was an agent with express authority to bind Local 586 as a principal).

[18] Moreover, it is noted that para.7 concludes by saying "*Both* parties agree…." It does not say" *All* parties". This reinforces the argument that the Council was not a party to the Settlement.

[19] At the commencement of the hearing before the Board, at the apparent request of Vice-Chair Jesin, counsel for the Council wrote a letter to Local 586 formally warning that if the Council was successful in its Current Application (arguing that the Settlement was unenforceable and illegal) then some of the terms seen as beneficial to Local 586 would fall away. It seems strange that Local 586 would remain passive if it did not favour the demise of the Settlement.

The "Abuse of Process" Issue

[20] The employers also advanced as a ground of their motion before Vice-Chair Jesin that there was an abuse of process on the part of the Council (and Local 586) in bringing the Current Application, given the intent of the Settlement as expressed in para. 7.

[21] Vice-Chair Jesin provided no express findings on the asserted ground of 'abuse of process' by the employers. Implicitly, the result of his Decision dismisses this assertion. However, Vice-Chair Jesin provides no reasons at all in respect of this ground raised by the employers in their motion before him. Moreover, none of the counsel now involved for the parties was present at the hearing before Vice Chair Jesin and it is unclear as to what submissions were made to Vice Chair Jesin on this issue of abuse of process.

[22] The employers apparently advance two arguments in this regard.

[23] First, the employers argue that there could be a finding of bad faith on the part of Local 586 and the Council within the meaning of para. 7 of the Settlement if the evidence established that Local 586 has persuaded the Council to act as its surrogate in overcoming the constraints of para. 7 imposed upon Local 586. The employers say that the evidence is that the Current Application is in reality brought on behalf of and for the benefit of Local 586 electrician employees. They say that any decision in the current proceeding before the Board would only benefit Local 586 employees and not the Council itself.

[24] It is noted that the concluding words of para. 7 state:

> …Both parties agree that they shall carry out the terms of this agreement in good faith and that each owes to the other a duty of good faith in the interpretation and administration of these minutes of settlement.

[25] The employers argue the Council is knowingly seeking to facilitate a party to the Settlement, Local 586, to act in bad faith, and thereby defeat the Settlement, contrary to Local 586's contractual obligations.. In other words, Local 586 would be seeking to do indirectly what it cannot do directly, and doing so through the knowing agency of the Council.

[26] Second, the employers argue that the Council is bound by the Settlement even if it is not formally a signatory to it. The employers say that the evidence establishes that the Council had formal notice of the 1998 Application and proceedings and the opportunity to participate in both the proceedings and the negotiations leading to the Settlement. The employers say that the Council, at the least, knew of the wording of paragraph 7 as it was being negotiated and chose not to intervene to contradict the reasonable expectations created on the part of the employers. The employers say that for five years the Council has acquiesced in the application of the terms of the Settlement.

[27] The employers say there is estoppel by conduct on the part of the Council. The employers argue that the evidence establishes that in the circumstances the Council is either a party or *a privy* to the Settlement such that it is an abuse of process for the Council to now bring a second proceeding that mirrors the issues raised in the 1998 proceeding and resolved

through the Settlement. See generally, Donald J. Lange, *The Doctrine of Res Judicata in Canada* (2d ed.: Lexis Nexis Butterworths) at 387.

Disposition

[28] In my view, the issue raised by the application for Judicial Review is discrete, that is, it is whether the Council has the right to proceed. The facts relevant to its determination are separate and distinct from the facts to be put forward relating to the merits of the Council's Current Application before the Board.

[29] In my view, the Judicial Review sought is not properly categorized as seeking prematurely a review of a mere "interim decision" of the Board. The threshold motion and issue before the Board constitutes an exceptional or extraordinary situation that should properly be reviewed prior to any dealing by the Board with the Council's Current Application on its merits.

[30] There is no risk of fragmenting or protracting the proceedings for this Judicial Review of the Board decision on the threshold issue. See *Howe v. Institute of Chartered Accountants of Ontario* [1994] O.J. No. 1803 (C.A). There is equity and efficiency in proceeding to deal with a Judicial Review of the threshold issue as to whether the Council is bound by the Settlement prior to any further steps in the underlying merits proceeding before the Board. Reportedly, the Board has not yet scheduled the hearing date for the merits proceeding to commence.

[31] It is sufficient to say that the correctness of the OLRB decision on this threshold issue is open to serious debate. See generally *Ash v. Lloyd's Corp.*, (1992), 8 O.R. (3d) 282 at 284 (Gen. Div.).

[32] For the reasons given, I dismiss the motion of the Council to quash the Application for Judicial Review.

Alternative Motion of the Council to Strike the Affidavit of Mark Goldenberg

[33] The Applicant employers seek to put evidence before the Court, namely an affidavit of Mr. Mark Goldenberg, which the Council asserts does not properly form part of the record in an Application for Judicial Review. The Council moves to strike the affidavit.

[34] The employers state that the proffered Goldenberg affidavit is necessary to determine whether the Board made a jurisdictional error. Affidavit evidence may be admissible in support of an application for judicial review where a party would be prejudiced in its submissions on a fundamental issue under review. See *Denby v. Ontario (Agriculture, Food and Rural Affairs Appeal Tribunal)*, [2005] O.J. No. 4952 (Div. Ct.).

[35] Mr. Goldenberg, Senior Vice-President of Human Resources for the Applicant Brookfield LJ, attended at the hearing of the Board dealing with the Current Application. In his affidavit, Mr. Goldenberg traces the history of Local 586's 1998 Application before the Board, the negotiation and achievement of the Settlement, and the events leading up to the Current Application. He asserts that Mr. John Pender, a representative of the Council, is

personally aware of the history and meaning to the Settlement. Mr. Goldenberg's evidence is *prima facie* relevant to the issues.

[36] Mr. Goldenberg has not, of course, been cross-examined on his proffered evidence. Moreover, an affidavit by an interested party of his recollection as to the testimony of the witness for the opposing party at a hearing some two years earlier is certainly a departure from the norm relating to admissible evidence. However, there is no transcript of evidence (reportedly the norm for Board proceedings). As well, there was an agreed statement as to facts before the Board with only one witness, Mr. John Pender, giving oral testimony.

[37] In my view, it is necessary and appropriate in the interests of a proper and fair Judicial Review to have a record of relevant evidence, to the extent this is reasonably possible.. I addressed this situation by directing counsel for Mr. Pender to provide an affidavit as to his testimony before the Board in respect of the Current Application and the preliminary motion. The hearing was adjourned pending receipt of this affidavit.

[38] At the resumption of the hearing, I reviewed the affidavits of Mr. Goldenberg and Mr. Pender in open Court with counsel. Deletions have been made in respect of both affidavits put forward in the first instance, to arrive at restatements which amount to virtually common ground as to what the testimony of Mr. Pender was before Vice-Chair Jesin and the relevant background facts to the issues. If counsel cannot formalize this evidence by agreement in preparation for the March 2, 2007, Judicial Review, they may speak to me.

Disposition

[39] For the reasons given, the intended affidavit evidence of Mr. Goldenberg and Mr. Pender is admitted into evidence for the purpose of the Judicial Review.

2287-04-U (Court File No. DC05-00947400) Kostantino Iaonnidis, Applicant v. Transit Union, Local 1572, Corporation of The city of Mississauga, Transportation and Works Department, Transit Division Respondent

Delay – Duty of Fair Representation – Judicial Review – The applicant brought a motion before a single judge of the Divisional Court to overturn the Court's Registrar's dismissal of the application for judicial review for failure to perfect in a timely way (the applicant had lost a duty of fair representation complaint at the Board, because of undue delay) – The judge found no compelling reasons to vary the Registrar's ruling and confirmed there was nothing patently unreasonable about the Board's decision – Motion dismissed

Superior Court of Justice (Divisional Court), MacKenzie, September 15, 2006

ENDORSEMENT

[1] The Applicant moves under Rule 68.06(4) of the *Rules of Civil Procedure* to set aside or vary the order of the Registrar made under Rule 68.06(3) dismissing the Applicant's application for judicial review for delay.

[2] For the reasons set out below, the motion to set aside or vary the Registrar's order is dismissed with costs.

[3] The background facts are comprehensively set out in the factum of the City of Mississauga. The salient facts for the purpose of this ruling which are described below are taken from that source.

[4] The Applicant was employed by the City of Mississauga as a transit driver from August 12, 1985 until his dismissal on November 28, 2002. He was a member of and represented by the Respondent Amalgamated Transit Union, Local 1572 (the Union).

[5] Approximately two years after his dismissal, the City received on or about October 1, 2004 a complaint by the Applicant in accordance with s. 96 of the *Labour Relations Act, 1995*, (the *Act*). In this complaint, the Applicant alleged that the Union had violated his fair representation under s. 74 of the *Act* by failing to submit a grievance regarding his dismissal.

[6] The City intervened in the complaint arguing that the Applicant's complaint should be dismissed without a hearing due to the lengthy and unexplained delay of approximately two years.

[7] The Ontario Labour Relations Board (the Board) heard the complaint on or about the 4th of November 2004 and rendered its decision the same day. The Board ruled that the Applicant was required to "provide a convincing explanation for the delay and the reason why the Board should not grant a motion to the other parties to dismiss on that basis": p. 27, Decision of the Board dated November 4, 2004. By written submissions, the Applicant attempted to explain why he had delayed for approximately two years before filing a complaint against the Union. By its decision dated January 18, 2005, the Board declined to accept such explanation as justification for the delay and stated, among other things:

> It is inherently unfair to the Union to have an applicant pursue and fail in obtaining relief in other forums and then to decide to proceed with a s. 74 complaint after a substantial period of time has elapsed: Decision OLRB January 18, 2005, p. 29.

[8] By way of a letter from a solicitor for the Board received on or about December 9, 2005, the City learned the Applicant had initiated an application for judicial review in the Divisional Court by notice issued September 15, 2005.

[9] On or about December 22, 2005, counsel for the Board served all parties with the Board's Record of Proceeding. However, as of that date the City had not received the Applicant's notice of application for judicial review.

[10] By letter dated January 25, 2006, counsel for the City notified the Applicant of its non-receipt of the notice of application for judicial review. On or about January 30, 2006, the City received the notice of application for judicial review.

[11] About one month later, on February 28, 2006, counsel for the Applicant notified each of the Respondents i.e. the Union and the City, that the Applicant required their consent to add the Board as a party. The consents were delivered on a timely basis, by the City on or about March 2, 2006.

[12] On or about March 10, 2006, the Union moved to have the application for judicial review dismissed by the Registrar on the basis of delay, pursuant to Rule 68.06(1).

[13] On or about March 22, 2006, the Registrar for the Divisional Court heard the motion by the Union and dismissed the application for judicial review, in accordance with Rule 68.06(3). In dismissing the Application for Judicial Review, the Registrar noted the Applicant had failed to deliver his application record and factum within 30 days of the Board's filing its Record of Proceedings: see R.68.04(1)(a).

[14] The position of the Applicant now is that this court should exercise its discretion under Rule 68.06(4) and set aside the Registrar's dismissal order. Counsel for the Applicant submits that any delay in complying with the time limits was reasonably explained and that the justice of the case requires an extension of the time for the Applicant's compliance. In this regard, the Applicant refers to the difficulties encountered in obtaining a certificate of perfection and other procedural requirements and contends the justice of the case requires an extension of the time limit period.

[15] In response, the Union and the City state that to set aside the Registrar's dismissal order, the Applicant must meet the three part test set out in *Chiu v. Universal Water Technology Inc.*, [2004] O.J. No. 4048 (Div. Ct.), as follows:

> The applicant must prove that:
>
> (a) He had a *bona fide* intention to comply with the applicable time limit;
>
> (b) There was a reasonable explanation for the delay; and
>
> (c) The justice of the case requires an extension.

[16] Dealing with the first branch of the test, i.e. the *bona fide* intention to comply within the applicable time limit, I accept the evidence of the Applicant that he had a *bona fide* intention to comply with the applicable time limit, however, he obviously failed to do so.

[17] Apart from any other aspects of delay, it is undisputed that there has been a minimum delay of three months, that is, from the date of issuance of the notice of application for judicial review and the existence of such application coming to the attention of the City. In addition, the Board provided the Applicant and the other Respondents with its Record of Proceedings on or about December 22, 2005 but the Applicant failed to take any steps to add the Board as a party until approximately three months had past. As well, the Applicant gave

no indication of the need for additional time to deliver his application and record, notwithstanding the expiry of the deadline stipulated in Rule 68.04(1)(a).

[18] The inquiry then turns to the second branch whether there has been a reasonable explanation for the delay.

[19] I agree with the contention of the City and Union that the Applicant has failed to provide a reasonable explanation for this delay. There is no reasonable explanation as to why, having issued the notice of application on September 15, 2005, (a) the Applicant took no steps to serve the Respondents until January of 2006; and (b) the Applicant, for a period of about two months, took no active steps to add the Board as a party after being notified of the Board's request to be so added on or about December 19, 2005. As well, the City points out that there is no adequate reason for the Applicant's decision to serve his application record and factum on the very day that the Registrar heard the motion of the Union to dismiss the application on the basis of delay.

[20] I then turn to the third branch, that is, whether the justice of the case requires an extension.

[21] The standard of review for the Board's decision to dismiss the Applicant's initial complaint is patent unreasonableness. This standard of review, when coupled with the finality clauses found in sections 114 and 116 of the *Act* and the expertise of the Board, leads the court to be highly deferential to the decisions of the Board: see *Blasdell v. OLRB*, [2006] O.J. No. 406, paras. 19-20. See also *Jamal Ontario Labour Relations Board*, [2005] O.J. No. 4163 (Div. Ct.) in which the court referred to the specialization of the Board and its mandate to administer the statutory labour relations regime in Ontario, particularly in the context of the Board's jurisdiction to adjudicate on issues of delay prior to dealing with a case on its merits.

[22] The Applicant submits that the Board in its reasons in a decision dated January 18, 2005 had misunderstood (among other things) the nature of the Applicant's litigation against health and extended benefits insurance carriers. In this regard, the Applicant focuses on the following sentence in paragraph 8 of the reasons of the Board:

> The only reason advanced for the delay from the additional material filed by the applicant is that he was involved in pursuing other avenues in dealing with his claim for extended benefits.
>
> Decision dated January 18, 2005

[23] Counsel for the Union refers to an extract from this court in *Jamal v. Ontario Public Service Employees Unions and Ontario Labour Relations Board*, [2005] O.J. No. 4163, in dealing with the Board's jurisdiction to decide whether or not there was unreasonable delay and the applicable standard of review, i.e. patent unreasonableness, in the following terms:

> Unless the determination by the Board can be characterized as "clearly irrational" or "so flawed that no amount of deference can allow them to stand" or "bordering on the absurd", the Board is entitled to deference.

[24] I find nothing in the above extract from paragraph 8 of the Board's decision, above that comes within the language used in *Jamal* as to constitute error of such nature that could properly described as patently unreasonable. Accordingly, I find that the Board's decision and reasoning for the decision was not patently unreasonable.

[25] In the result, the motion to set aside the order of the Registrar is dismissed, with costs to the Respondents appearing on the return of the motion.

[26] If the parties are unable to agree on costs, I will entertain written submissions, as follows:

> (1) By the Respondents, not to exceed 4 pages exclusive of supporting materials, to be received within 15 days from the date of issuance of this Ruling;
>
> (2) By the Respondents, not to exceed 4 pages exclusive of supporting materials, to be received within 10 days following his receipt of the Respondents' submissions; and
>
> (3) Reply, if any, by the Respondents, not to exceed 4 pages, within 7 days from date of receipt of the Applicant's responding submissions.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 2006

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1249-06-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bid Construction Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the Bid Construction Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of the Bid Construction Inc. in all sectors of the construction industry in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1321-06-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Gerry Chaput c.o.b. General Renovations and Contracting (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Gerry Chaput c.o.b. as General Renovations and Contracting in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of Gerry Chaput c.o.b. as General Renovations and Contracting in all sectors of the construction industry in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2036-06-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Arcamm Electrical Services Ltd. (Respondent)

Unit: "all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication installers in the employ of Arcamm Electrical Services Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication installers in the employ of Arcamm Electrical Services Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2667-06-R: Brick and Allied Craft Union of Canada (Applicant) v. 1422050 Ontario Inc. o/a Meph's Masonry (Respondent)

Unit: "all bricklayers, stonemasons and plasterers and their respective apprentices, improvers and working forepersons in the employ of the responding party in all sectors of the construction industry within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2673-06-R: Sheet Metal Workers' International Association, Local 51 (Applicant) v. Proaction Aluminum Inc. (Respondent)

Unit: "all sheet metal workers and sheet metal workers' apprentices and all employees engaged in sheet metal work in the employ of Proaction Aluminum Inc. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2675-06-R: Sheet Metal Workers' International Association, Local 51 (Applicant) v. Tops Roofing Ltd. (Respondent)

Unit: "all journeymen roofers, apprentice roofers, assistant roofers and helpers in the employ of Tops Roofing Ltd. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2679-06-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Vidak Kovacevic o/a City Electric (Respondent)

Unit: "all electricians and electricians' apprentices, linemen and linemen apprentices, network cabling specialists and network cabling specialists' apprentices and communication cable installers in the employ of Vidak Kovacevic o/a City Electric in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all electricians and electricians' apprentices, linemen and linemen apprentices, network cabling specialists and network cabling specialists' apprentices and communication cable installers in the employ of Vidak Kovacevic o/a City Electric in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

2688-06-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 853 - Sprinkler Fitters of Ontario (Applicant) v. Siemens Canada Limited and/or Siemens Building Technologies Limited (Respondent)

Unit: "all journeymen and apprentice sprinkler fitters in the employ of Siemens Building Technologies Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all journeymen and apprentice sprinkler fitters in the employ of Siemens Building Technologies Limited in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2780-06-R: Construction Workers Local 53, affiliated with the Christian Labour Association of Canada (Applicant) v. 675606 Ontario Limited c.o.b. as Specific Utility Contractors (Respondent)

Unit: "all construction labourers and all persons engaged in the operation of cranes, shovels, cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of Specific Utility Contractors in all sectors of the construction industry in the Counties of Essex, Kent, and Lambton, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2875-06-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Delta Mechanical Ltd. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Delta Mechanical Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices s in the employ of Delta Mechanical Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (15 employees in unit)

2876-06-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Golden Plan Construction Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Golden Plan Construction Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all painters and painters' apprentices in the employ of Golden Plan Construction Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit) (Clarity Note)

Bargaining Agents Certified Subsequent to Vote

3031-05-R: The Northern Ontario School of Medicine Faculty Association (Applicant) v. Northern Ontario School of Medicine (Respondent)

Unit: "all members of the faculty, professional librarians, curriculum instructional designers and student affairs officers employed full-time by Northern Ontario School of Medicine in northern Ontario save and except Associate Deans and persons above the rank of Associate Dean, Chief Administrative Officer, Division Heads, Director Health Information Services, Director Finance, Director Technology, Director Human Resources, Director Development Liaison, Director Aboriginal Affairs, Director of Admissions and Student Affairs, Director of Undergraduate Community Learning, Director of Undergraduate Medical Education Programs, Director e-Learning, Executive Director of Community and Professional Development, Senior Resource Officer, Office Manager, Communications Consultant, Physicians, post doctoral fellows and coordinators" (26 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	26
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	14

0779-06-R: Labourers' International Union of North America, Local 527 (Applicant) v. Cornwall Gravel Company Limited (Respondent)

Unit: "all truck drivers employed by Cornwall Gravel Company Limited at or out of the City of Cornwall, save and except non-working foremen and persons above the rank of non-working foreman" (37 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	41
Number of persons who cast ballots	41
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	25
Number of segregated ballots cast by persons whose names appear on voter's list	20
Number of segregated ballots cast by persons whose names do not appear on voters' list	28
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	27
Number of ballots marked against applicant	13
Number of ballots segregated and not counted	0

1264-06-R: Service Employees International Union Local 1.on (Applicant) v. Care2000 Health Services (Respondent)

Unit: "all employees of Care2000 Health Services, in the City of Toronto, Ontario, save and except Registered Nurses, physiotherapists, occupational therapists, supervisors, delivery sales people, or persons above the rank of supervisors and office staff" (55 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	29
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

2585-06-R: Syndicat canadien de la fonction publique (Applicant) v. Hôpital Montfort (Respondent)

Unit: "tous les employés cléricaux et de bureau de l'Hôpital Montfort d'Ottawa incluant les cliniques satellites, à l'exception des gestionnaires, des personnes dont la classification est égale ou supérieure à celles des gestionnaires, des employés aux Ressources humaines, des secrétaires de service et/ou de direction, des adjointes administratives et des employés visés par une autre unité d'accréditation" (159 employees in unit)

Number of names of persons on revised voters' list	162
Number of persons who cast ballots	89
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	88
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	75

Number of ballots marked against applicant	14
Number of ballots segregated and not counted	0

2610-06-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Lind Furniture (Canada) Ltd. (Respondent)

Unit: "All employees of Lind Furniture (Canada) Ltd. in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical, sales, technical employees, engineers and security guards." (135 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	144
Number of persons who cast ballots	142
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	128
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	14
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	109
Number of ballots marked against applicant	30
Number of ballots segregated and not counted	3

2655-06-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Telespectrum (Canada) Inc. (Respondent)

Unit: "all employees of Telespectrum (Canada) Inc. in the City of Toronto, save and except supervisors, persons above the rank of supervisor, quality coach, office, clerical, technical and human resource employees" (175 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	163
Number of persons who cast ballots	128
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	122
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	99
Number of ballots marked against applicant	23
Number of ballots segregated and not counted	6

2705-06-R: Service Employees International Union Local Lon (Applicant) v. Arnprior Villa Retirement Residence (Respondent)

Unit: "all employees of Arnprior Villa: in the Town of Arnprior, County of Renfrew, save and except, Registered Nurses, managers and persons above the rank of manager" (22 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on	0

voters' list	
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	2

2765-06-R: Service Employees International Union Local 1.on (Applicant) v. 2032048 Ontario Inc. c.o.b. as Royal Oak Village (Respondent)

Unit: "all employees of 2032048 Ontario Inc. c.o.b. as Royal Oak Village in the town of La Salle, in the County of Essex, Ontario, save and except supervisors, persons above the rank of supervisor and office and clerical staff" (14 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

2776-06-R: Service Employees International Union Local 1.on (Applicant) v. Oak Park Lakeshore Inc. c.o.b. Oak Park Lakeshore (Respondent)

Unit: "all employees of Oak Park Lakeshore Inc. c.o.b. Oak Park Lakeshore in the town of Belle River, in the county of Essex, Ontario, save and except supervisors, persons above the rank of supervisor and office and clerical staff" (40 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	39
Number of persons who cast ballots	38
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	38
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	15
Number of ballots segregated and not counted	0

2786-06-R: United Food and Commercial Workers International Union (UFCW Canada) (Applicant) v. Jungbunzlauer Canada Inc. (Respondent) v. Communications, Energy and Paperworkers Union of Canada, and its Local 2003 (Intervenor)

Unit: "all employees of Jungbunzlauer Canada Inc., employed in the City of Port Colborne, Ontario, save and except supervisors, those above the rank of supervisors, office staff, clerical staff and students employed during the summer vacation period and employees covered by a subsisting collective agreement" (41 employees in unit) *(Having regard to the agreement of the parties.) (Clarity Note)*

Number of names of persons on revised voters' list	41

Number of persons who cast ballots	38
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	37
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	12
Number of ballots segregated and not counted	1

Applications for Certification Dismissed Without Vote

1580-05-R: Labourers' International Union of North America, Local 625 (Applicant) v. Southside Construction (London) Limited (Respondent)

2768-06-R: Jeff Little (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent)

2811-06-R: Canadian Union of Postal Workers (Applicant) v. Omni Facility Services Canada Corp. (Respondent)

2812-06-R: Canadian Union of Postal Workers (Applicant) v. Omni Facility Services Canada Corp. (Respondent)

2871-06-R: Ontario Nurses' Association (Applicant) v. West Park Health Centre (Respondent)

Applications for Certification Dismissed Subsequent to Vote

3268-04-R: Construction and Allied Workers Local Union 607 (Applicant) v. Dysievick Romano Contracting Ltd. (Respondent)

Unit: "all construction labourers in the employ of Dysievick Romano Contracting Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of Dysievick Romano Contracting Ltd. in all other sectors of the construction industry in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

0619-06-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. U-Pak Disposals Limited and/or U-Pak Disposal (1989) Ltd. (Respondent)

Unit: "all employees of U-Pak Disposals Limited and/or U-Pak Disposal (1989) Ltd. the company working at or out of 15 Tidemore Road, Toronto, Ontario save and except supervisors, persons above the rank of supervisor and office and sales staff" (70 employees in unit)

Number of names of persons on revised voters' list	101
Number of persons who cast ballots	98
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	75
Number of segregated ballots cast by persons whose names appear on voter's list	23
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	58
Number of ballots segregated and not counted	23

1391-06-R: United Food and Commercial Workers Canada, Local 1000A (Applicant) v. D.J. Muzyk Drugs Ltd. c.o.b. as Shoppers Drug Mart Store #843 (Respondent)

Unit #1: "all employees of Shoppers Drug Mart Store #843 employed at 1515 Steeles Avenue East, in the City of North York, Ontario, save and except Pharmacists, Assistant Managers, Department Managers and persons above the rank of Department Managers." (27 employees in unit)

Number of names of persons on revised voters' list	36
Number of persons who cast ballots	25
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of names of persons on revised voters' list	20
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	11
Number of ballots segregated and not counted	0

2536-06-R: Communications, Energy and Paperworkers Union of Canada (CEP) (Applicant) v. OPSEU Joint Trusteed Benefits Fund (Respondent)

Unit: "all employees of OPSEU Joint Trusteed Benefit Fund in the City of Toronto, save and except managers and those above the rank of manager" (6 employees in unit)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	1

2576-06-R: Christian Labour Association of Canada (Applicant) v. William Neilson Ltd./Ltée, Ottawa, Ontario (Respondent) v. Milk & Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647 affiliated with the International Brotherhood of Teamsters (Intervenor)

Unit: "all employees of William Neilson Ltd./Ltée at its Ottawa plant, save and except for foremen, persons above the rank of foreman, office staff, operating engineer, and firemen and helpers." (94 employees in unit)

Number of names of persons on revised voters' list	95
Number of persons who cast ballots	78
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	78
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	28
Number of ballots marked in favour of Intervenor	50
Number of ballots segregated and not counted	0

2577-06-R: Teamsters Local Union 91 (Applicant) v. Eastern Ontario Water Technology Ltd. c.o.b. as "Culligan" (Respondent)

Unit: "all employees of Eastern Ontario Water Technology Ltd. c.o.b. as "Culligan" in the City of Ottawa, save and except supervisors and persons above the rank of supervisor, service technicians, office and sales staff" (7 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

2608-06-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Shred-it Canada Corporation Inc. (Respondent)

Unit: "all employees of the Oakville Branch of Shred-it Canada Corporation Inc., in the Town of Oakville, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical staff, sales person" (45 employees in unit)

Number of names of persons on revised voters' list	47
Number of persons who cast ballots	46
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	42
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0

Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	24
Number of ballots segregated and not counted	4

2622-06-R: Ontario Public Service Employees Union (Applicant) v. London Health Sciences Centre (Respondent) v. CAW - Canada (Intervenor)

Unit: "all Pharmacy Technicians, Physiotherapy Technicians Assistants and Occupational Therapy Assistants employed by London Health Sciences Centre at the University Campus site in the City of London on a full-time, part-time and casual basis save and except supervisors and persons above the rank of supervisor and persons covered by subsisting Collective Agreements" (54 employees in unit)

Number of names of persons on revised voters' list	54
Number of persons who cast ballots	47
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	47
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	26
Number of ballots segregated and not counted	0

2625-06-R: Service Employees International Union, Local 1.on (Applicant) v. CSH Glacier Ridge Retirement Residence (Respondent)

Unit: "all employees of Glacier Ridge Retirement Residence in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor and office and clerical staff" (34 employees in unit)

Number of names of persons on revised voters' list	34
Number of persons who cast ballots	28
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	27
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	17
Number of ballots segregated and not counted	1

2728-06-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Swish Maintenance Limited (Respondent)

Unit: "all employees of Swish Maintenance Limited in the City of Peterborough, save and except supervisors, those above the rank of supervisor, sales persons, engineering and office and clerical staff" (25 employees in unit)

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	26
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of segregated ballots cast by persons whose names appear on voter's list	4

Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	15
Number of ballots segregated and not counted	4

2774-06-R: Teamsters Local Union No. 938 (Applicant) v. Value Village Stores Inc. (Respondent)

Unit: "all employees of Value Village Stores Inc. in the City of Barrie in the Province of Ontario, save and except supervisors and persons above the rank of supervisor" (47 employees in unit)

Number of names of persons on revised voters' list	49
Number of persons who cast ballots	47
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	47
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	32
Number of ballots segregated and not counted	0

2775-06-R: Service Employees International Union Local 1.on (Applicant) v. Red Cross - Community Health Services (Respondent)

Unit: "all employees of Canadian Red Cross Society, Community Health Services (Ontario Zone) in the Counties of Hastings and Prince Edward, save and except Supervisors and persons above the rank of Supervisor and office staff" (95 employees in unit)

Number of names of persons on revised voters' list	106
Number of persons who cast ballots	73
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	71
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	28
Number of ballots marked against applicant	43
Number of ballots segregated and not counted	2

Applications for Certification Withdrawn

2225-03-R: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 786 (Applicant) v. Levert Personnel Resources Inc. (Respondent) v. Northern Ontario Workers Association (Intervenor)

2251-03-R: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 786 (Applicant) v. Levert Personnel Resources Inc. (Respondent) v. Northern Ontario Workers' Association (Intervenor)

2254-03-R: Millwright Local 1425, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Levert Personnel Resources Inc. (Respondent) v. Northern Ontario Workers Association (Intervenor)

2334-03-R: Millwright Local 1425, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Levert Personnel Resources Inc. (Respondent) v. Northern Ontario Workers Association (Intervenor)

1016-05-R: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 786 (Applicant) v. North Bay Welding & Metal Fabrications Inc. (Respondent)

0774-06-R: Labourers' International Union of North America, Local 527 (Applicant) v. Cornwall Gravel Company Limited (Respondent)

2308-06-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. TNT Logistics North America (Respondent) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Intervenor)

2696-06-R: International Brotherhood of Electrical Workers, Local 120 (Applicant) v. Arcon Electric Ltd. (Respondent) v. Construction Workers Local 53, affiliated with Christian Labour Association of Canada (Intervenor)

2816-06-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Tiffany Gate Foods Inc. (Respondent)

2895-06-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. ABC Group Inc. (Respondent)

2976-06-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Stelco Inc. and/or, Hamilton Steel GP Inc. (Respondents)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0073-06-R: John Mills (Applicant) v. General Motors of Canada Limited, Automotive Component Systems of Canada Inc. also known as ACSYS Technologies, Peregrine Oshawa Inc. (Respondents) v. Ontario Union of Stationary Engineers (Intervenor) *(Dismissed)*

0239-06-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (Applicant) v. Tate Andale Canada Inc. and Concord Screen Inc. (Respondents) *(Withdrawn)*

0808-06-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 2458 (Applicant) v. Livingston International Inc. and PBB Global Logistics (Respondents) *(Withdrawn)*

1064-06-R; 2442-06-R: International Union of Bricklayers and Allied Craftsmen, Local 31 and Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicants) v. Floorcraft Design Inc. and, Jadcon Flooring Limited (Respondents); Brick and Allied Craft Union of Canada (Applicant) v. DJC Flooring Inc. and Jadcon Flooring Limited and Floorcraft Design Inc. (Respondents) *(Withdrawn)*

2090-06-R: United Food & Commercial Workers Canada Local 175 (Applicant) v. CanGro Pasta Inc. and Primo Foods Inc. (Respondents) *(Withdrawn) (Having regard to the agreement of the parties.)*

2628-06-R: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 786 (Applicant) v. D & D Metal Erectors Inc., Steelcon Fabrication Inc. (Respondents) *(Withdrawn)*

2897-06-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Blue Line Durham Region Inc and Coventry Connections Inc. and 1298934 Ontario Ltd. and 352044 Ontario Ltd. and Bonnie Sawyer (Respondents) *(Withdrawn)*

2977-06-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Stelco Inc. and/or Hamilton Steel GP Inc. (Respondents) *(Withdrawn)*

SALE OF A BUSINESS

3272-04-R: Canadian Union of Public Employees and its Local 4000 (Applicant) v. The Ottawa Hospital., Aramark Canada Limited Facilities Services and, Cancer Care Ontario (Respondents) *(Withdrawn)*

0073-06-R: John Mills (Applicant) v. General Motors of Canada Limited, Automotive Component Systems of Canada Inc. also known as ACSYS Technologies, Peregrine Oshawa Inc. (Respondents) v. Ontario Union of Stationary Engineers (Intervenor) *(Dismissed)*

0239-06-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (Applicant) v. Tate Andale Canada Inc. and Concord Screen Inc. (Respondents) *(Withdrawn)*

0808-06-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 2458 (Applicant) v. Livingston International Inc. and PBB Global Logistics (Respondents) *(Withdrawn)*

1064-06-R; 2442-06-R: International Union of Bricklayers and Allied Craftsmen, Local 31 and Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicants) v. Floorcraft Design Inc. and Jadcon Flooring Limited (Respondents); Brick and Allied Craft Union of Canada (Applicant) v. DJC Flooring Inc. and Jadcon Flooring Limited and Floorcraft Design Inc. (Respondents) *(Withdrawn)*

2090-06-R: United Food & Commercial Workers Canada Local 175 (Applicant) v. CanGro Pasta Inc. and, Primo Foods Inc. (Respondents) *(Withdrawn) (Having regard to the agreement of the parties.)*

2628-06-R: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 786 (Applicant) v. D & D Metal Erectors Inc., Steelcon Fabrication Inc. (Respondents) *(Withdrawn)*

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

2643-06-R: Canadian National Federation of Independent Unions (Applicant) v. Forge Workers' Alliance Association, Demshe Products (Respondents) *(Granted)*

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1804-05-R: James Ricchetti (Applicant) v. Universal Workers Union Local 183 (Respondent) v. 702153 Ontario Limited and/or Fairgate Homes Inc. and/or Fairwood Homes (Intervenor) *(Granted)*

Unit: "all construction labourers in the employ of Fairgate Homes and/or Fairgate Homes Inc. and/or 702153 Ontario Limited and/or Fairpark Homes Inc. in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sectors, save and except non-working foremen and persons above the rank of non-working foremen." (3 employees in unit)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0

Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2
Number of ballots segregated and not counted	0

3637-05-R: Faywood Boulevard Child Care Program operating as Faywood Blvd. Child Care Centre (Applicant) v. Canadian Union of Public Employees and its Local 2563 (Respondent) *(Withdrawn)*

0395-06-R: International Union of Painters and Allied Trades, Local 1891 (Applicant) v. The Operative Plasterers' and Cement Masons' International Association of the United States and Canada - Local 124 (Respondent) v. R.P. Syntex Walls Systems (Intervenor) *(Granted)*

2461-06-R: Murray Bist (Applicant) v. Amalgamated Transit Union Canada Local 1587 (Respondent) v. Miller Transit Ltd. (Intervenor) *(Dismissed)*

Unit: "all employees of Miller Transit Ltd. employed in and out of the Municipalities of Markham and Richmond Hill, save and except office and sales staff, supervisors and persons above the rank of supervisors and inspectors" (230 employees in unit)

Number of names of persons on revised voters' list	207
Number of persons who cast ballots	77
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	175
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	
Number of ballots marked in favour of respondent	67
Number of ballots marked against respondent	108
Number of ballots segregated and not counted	2

2522-06-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union and TNT Logistics North America Inc. (Respondents) *(Withdrawn)*

2961-06-R: Dennis Missett (Applicant) v. Canadian Union of Public Employees Local 5167 (Respondent) *(Dismissed)*

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2089-04-U: Kumar Pal Tiwari (Applicant) v. CUPE, Local 905 (York Region Unit), Mr. Robert Townes and Mr. Douglas Sheppard (Respondent) v. The Regional Municipality of York (Intervenor) *(Withdrawn)*

2333-04-U; 2428-04-U: Local 636, of the International Brotherhood of Electrical Workers (Applicant) v. Hydro Ottawa Limited (Respondent) *(Withdrawn)*

2956-04-U; 3123-04-U: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 786 and, Millwright Local 1425, United Brotherhood of Carpenters and Joiners of America (Applicants) v. Levert Personnel Resources Inc.., Nortemp Staffing Services Inc., Richard Levert, Richard Harper and Al Whalen (Respondents); Levert Personnel Resources Inc and Richard Levert (Applicant) v. International Association of

Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 786 and Millwright Local 1425, United Brotherhood of Carpenters and Joiners of America (Respondents) v. Northern Ontario Workers Association (Intervenor) *(Withdrawn)*

4343-04-U: The Corporation of the City of Hamilton (Applicant) v. Ontario Nurses' Association (Respondent) v. Canadian Union of Public Employees and its Local 5167 (Intervenor) *(Withdrawn)*

1422-05-U: Labourers' International Union of North America, Local 625 (Applicant) v. Southside Construction and, John Axford (Respondents) *(Withdrawn)*

1740-05-U: Robert Cymbalski (Applicant) v. International Association of Machinists and Aerospace Workers, Local 901 (Respondent) *(Withdrawn)*

3035-05-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Belanger Construction (1981) Inc., R.M. Belanger Limited (Respondents) *(Withdrawn)*

3831-05-U: Mildred Bailey, Debbie Kerr, Constance July, Debbie Bradley, Florris Taffe, Bozena Regal (Applicant) v. Service Employees International Union Local 1 (Respondent) *(Withdrawn)*

3833-05-U: John E. Mills (Applicant) v. Ontario Union of Stationary Engineers (Respondent) v. General Motors of Canada Limited, ACSYS Automotive Component Systems of Canada Inc. (Intervenors) *(Dismissed)*

3863-05-U: Tammy McGregor and, Ontario Public Service Employees Union (Applicants) v. Management and Training Corporation Canada c.o.b. as Central North Correctional Centre (Respondent) *(Withdrawn)*

3983-05-U: Frank Farkas (Applicant) v. "GMP" Glass, Molders, Pottery, Plastics & Allied Workers International Union AFL-CIO-CLC Local No. 3B (Respondent) *(Withdrawn)*

3986-05-U: Kenneth William Bruce (Applicant) v. Ontario Secondary School Teachers Federation, District 9 (Respondent) v. Greater Essex County District School Board (Intervenor) *(Dismissed)*

4081-05-U: Mike Napolitano (Applicant) v. Thomson Products Employees' Association (Respondent) *(Withdrawn)*

4117-05-U: Canadian Union of Public Employees and its Local 2563 (Applicant) v. Faywood Boulevard Child Care Program, Faywood Boulevard Child Care Centre and Kim Cullen (Respondent) *(Withdrawn)*

0347-06-U: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Inteleservices Canada Inc. (Respondent) *(Withdrawn)*

0658-06-U: Communications, Energy and Paperworkers Union of Canada, Local 333 (Applicant) v. Moore Packaging Corporation (Respondent) *(Granted) (Having regard to the agreement of the parties.)*

0817-06-U: Labourers' International Union of North America, Local 527 (Applicant) v. Cornwall Gravel Company Limited (Respondent) *(Withdrawn)*

0818-06-U: Teamsters Local Union No. 419 (Applicant) v. International Cold Storage 2003 Inc. (Respondent) *(Terminated)*

1189-06-U: Valerie Butler (Applicant) v. United Food & Commercial Workers Canada Local 175 (Respondent) *(Dismissed)*

1252-06-U: Cesar Caetano (Applicant) v. Teamsters Local Union No. 419 (Respondent) v. Waste Management of Canada Corporation (Intervenor) *(Dismissed)*

1396-06-U: Robert Knapp (Applicant) v. Canadian Union of Public Employees and its Local 2107 (Respondent) v. St. Lawrence Lodge (Intervenor) *(Terminated) (Having regard to the agreement of the parties.)*

1634-06-U: United Food and Commercial Workers Canada, Local 1000A (Applicant) v. Shoppers Drug Mart Store #843, D.J. Muzyk Drugs Ltd., Shoppers Drug Mart Inc. and, Shoppers Drug Mart Corporation (Respondents) *(Withdrawn)*

1816-06-U: Mark St. Jean (Applicant) v. United Steel Workers of America and USWA Local 6398 (Respondent) *(Withdrawn)*

1860-06-U: Dale Cedar (Applicant) v. C.A.W. Local 195 (Respondent) *(Withdrawn)*

2031-06-U: Iain Douglas (Applicant) v. Ontario Public Service Employees Union (Respondent) *(Dismissed)*

2047-06-U: Rosemary Masotti (Applicant) v. Ontario Nurses' Association (Respondent) v. Niagara Health System (Intervenor) *(Withdrawn)*

2256-06-U: Ontario Public Service Employees Union (Ranger) (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Correctional Services and Community Safety (Respondent) *(Dismissed)*

2321-06-U: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Colson Casters Limited (Respondent) *(Withdrawn) (Having regard to the agreement of the parties.)*

2390-06-U: Khanh Thuc Mai (Theresa) (Applicant) v. Canadian Office & Professional Employees Union Local 343 (Respondent) *(Withdrawn)*

2397-06-U: Mrs. Daele McMillan (Applicant) v. Canadian Office and Professional Employees Union Local 96 (Respondent) *(Withdrawn)*

2480-06-U: The Ontario Public Service Employees Union (Applicant) v. The Whitby Mental Health Centre Corporation (Respondent) *(Withdrawn)*

2507-06-U: Darlene Farago (Applicant) v. UNITE Ontario Council Local 314 (Respondent) *(Withdrawn)*

2752-06-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. PWO Canada Inc. (Respondent) *(Withdrawn)*

2836-06-U: The Alliance of Canadian Cinema Television and Radio Artists (ACTRA) (Applicant) v. The Canadian Film and Television Production Association ("CFPTA") (Respondent) *(Withdrawn)*

APPLICATION FOR INTERIM ORDER

3186-05-M: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Belanger Construction (1981) Inc., R.M. Belanger Limited (Respondents) *(Withdrawn)*

2518-06-M: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. AXA Electric Inc. (Respondent) *(Granted)*

2937-06-M: International Union of Operating Engineers, Local 793 (Applicant) v. Benko Sewer Maintenance Ltd. (Respondent) *(Terminated)*

APPLICATIONS FOR RELIGIOUS EXEMPTION

1848-06-M: Durene Seymour (Applicant) v. Ontario Public Service Employees Union Local 251, Community Living Mississauga (Respondents) *(Withdrawn)*

JURISDICTIONAL DISPUTES

1202-06-JD: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers and its Local 2486 (Applicant) v. R.M. Belanger Limited and Labourers' International Union of North America, Local 493 (Respondents) *(Withdrawn)*

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0649-06-OH: Hector Montesano (Applicant) v. Fourbro Frames Inc. (Respondent) *(Dismissed)*

1378-06-OH: Mylee MacDonald (Applicant) v. Bert Wierenga (Respondent) *(Withdrawn)*

1772-06-OH: Catherine Lena Loutraris (Applicant) v. Jonview Canada (Respondent) *(Dismissed)*

2253-06-OH: Jason Foote (Applicant) v. Team Industrial Services (Respondent) *(Withdrawn)*

CONSTRUCTION INDUSTRY GRIEVANCES

1468-05-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787 (Applicant) v. Display ixtures, A Division of Westfair Foods Ltd. (Respondent) *(Withdrawn)*

1994-05-G: Brick and Allied Craft Union of Canada, Local 31 (Applicant) v. Rockford Tile Contractors (1996) Ltd. (Respondent) *(Withdrawn)*

2446-05-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787 (Applicant) v. Display Fixtures, A Division of Westfair Foods Ltd. (Respondent) *(Withdrawn)*

2467-05-G: Brick and Allied Craft Union of Canada, Local 31 (Applicant) v. Rockford Tile Contractors (1996) Ltd. (Respondent) *(Withdrawn)*

2525-05-G: Brick and Allied Craft Union of Canada, Local 31 (Applicant) v. Rockford Tile Contractors (1996) Ltd. (Respondent) *(Withdrawn)*

2831-05-G: International Union of Elevator Constructors, Local 50 (Applicant) v. ThyssenKrupp Elevator (Canada) Limited (Respondent) *(Terminated)*

1304-06-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Derbtile Construction Inc. (Respondent) *(Granted)*

1617-06-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Ozz Infrastructure Solutions Inc. (Respondent) *(Withdrawn)*

1989-06-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Oban Electric Limited (Respondent) *(Endorsed Settlement)*

2093-06-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Comstock Canada Ltd. c.o.b. as Comstock Canada (Respondent) *(Withdrawn)*

2219-06-G: International Union of Operating Engineers, Local 793 (Applicant) v. Tascor Construction Ltd. (Respondent) *(Granted)*

2283-06-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Vanbots Construction Corporation (Respondent) *(Withdrawn)*

2335-06-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Carmichael Engineering Ltd. (Respondent) *(Withdrawn)*

2372-06-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Direct Energy Business Services, A Division of Direct Energy Marketing Limited (Respondent) *(Withdrawn)*

2426-06-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Com-Kote Interiors Inc. (Respondent) *(Endorsed Settlement)*

2434-06-G: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Mady Contract Division Ltd. (Respondent) *(Withdrawn)*

2548-06-G: Sheet Metal Workers' International Association, Local 285 (Applicant) v. Jemview Gas Piping Limited (Respondent) *(Withdrawn)*

2578-06-G: Labourers' International Union of North America, Local 837 (Applicant) v. M J Dixon Construction Limited (Respondent) *(Endorsed Settlement)*

2579-06-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers and Iron Workers District Council of Ontario and its Local 721 (Applicant) v. Eagle Steel Erecting (Respondent) *(Endorsed Settlement)*

2582-06-G: International Brotherhood of Electrical Workers, Local Union 120 (Applicant) v. Single Source Contracting Services Inc. (Respondent) *(Withdrawn)*

2583-06-G: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. Archie Pad and/or Archie Pad c.o.b. as Trademax Renovations (Respondent) *(Withdrawn)*

2602-06-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Alliance Drywall & Acoustics Inc. (Respondent) *(Endorsed Settlement)*

2623-06-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Eagle Steel Erecting Inc. (Respondent) *(Endorsed Settlement)*

2657-06-G: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, United Brotherhood of Carpenters and Joiners of America, Local 494 (Applicant) v. Modern Wood Fabricators (MWF) Inc. (Respondent) *(Granted)*

2674-06-G: Labourers' International Union of North America, Local 1059 (Applicant) v. J. Franze Construction Ltd. (Respondent) *(Withdrawn) (Having regard to the agreement of the parties.)*

2687-06-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Luis Ipanaque c.o.b. as Ipal Construction (Respondent) *(Granted)*

2753-06-G: Labourers' International Union of North America, Local 527 (Applicant) v. Allstar Concrete Drilling & Sawing Reg. (Respondent) *(Granted)*

2763-06-G: Labourers' International Union of North America, Local No. 625 (Applicant) v. Jersey Excavating Inc. (Respondent) *(Withdrawn)*

2764-06-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Comstock Canada Ltd. (Respondent) *(Withdrawn)*

2821-06-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Canadian Cutting and Coring (Toronto) Limited (Respondent) *(Withdrawn)*

2823-06-G: Labourers' International Union of North America, Local 625 (Applicant) v. RVR Concrete Inc. (Respondent) *(Withdrawn)*

2855-06-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Altrima Corp. (Respondent) *(Granted)*

2911-06-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Delso Restoration Limited (Respondent) *(Granted)*

2944-06-G: Labourers' International Union of North America, Local 1089 (Applicant) v. Architectural Precast Systems Inc. (Respondent) *(Withdrawn)*

APPEALS - EMPLOYMENT STANDARDS ACT

1538-02-ES: Nour Trading House Inc. (Applicant) v. Hue Lam and, Director of Employment Standards (Respondents) *(Dismissed)*

2106-04-ES: 1495761 Ontario Inc., 1451292 Ontario Inc. and 1451291 Ontario Inc. (Applicant) v. Lee Townsend, John Skelton, et al Director of Employment Standards (Respondents) *(Granted)*

0897-05-ES; 0898-05-ES; 0899-05-ES; 0900-05-ES: Rostrust Investments Inc. Investissements Rostrust Inc. (Applicant) v. Terry Doxtater and, Director of Employment Standards (Respondents); Rostrust Investments Inc. Investissements Rostrust Inc. (Applicant) v. Marc Plouffe and, Director of Employment Standards (Respondents); Rostrust Investments Inc. Investissements Rostrust Inc. (Applicant) v. Raymond Conlon and Director of Employment Standards (Respondents); Rostrust Investments Inc. Investissements Rostrust Inc. (Applicant) v. Daryl Hargrove and Director of Employment Standards (Respondents) *(Dismissed)*

0964-05-ES: Komal Holding Ltd. o/a Sober Bar and Restaurant and o/a Sober Bar & Restaurant (Applicant) v. George Samonas and Director of Employment Standards (Respondents) *(Dismissed)*

2597-05-ES: Jason David Wilson (Applicant) v. Raymond Industrial Equipment Ltd. and Director of Employment Standards (Respondents) *(Granted)*

2791-05-ES: Shamar Maintenance Inc. (Applicant) v. Adele Rochon, Director of Employment Standards (Respondents) *(Dismissed)*

2935-05-ES: Agnes Zarska (Applicant) v. Griffis International Limited and Director of Employment Standards (Respondents) *(Dismissed)*

3066-05-ES: Coquette International Inc. and TC Bizz.com Corp. (Applicant) v. Ferina Gookool, Director of Employment Standards (Respondents) *(Granted)*

3147-05-ES: Muhammad Nadeem Pramie A Director of Centralian Tech Inc. (Applicant) v. Muhammad Aslam and Director of Employment Standards (Respondents) *(Granted)*

3529-05-ES: Montgomery Bengle (Applicant) v. Quality Models Ltd. and Director of Employment Standards (Respondents) *(Dismissed)*

3702-05-ES: The Ottawa Young Men's and Young Women's Christian Association (Applicant) v. Tina Castilloux and, Director of Employment Standards (Respondents) *(Granted)*

4062-05-ES: 1527153 Ontario Limited o/a Red Onion Restaurant (Applicant) v. Cathie Love and Director of Employment Standards (Respondents) *(Dismissed)*

0044-06-ES: Coquette International Inc. and TC Bizz.com Corp. (Applicant) v. Lilowaite Parasram, Director of Employment Standards (Respondents) *(Granted)*

0287-06-ES: Gus Vermeulen (Applicant) v. Amar Transport Inc. and Director of Employment Standards (Respondents) *(Granted)*

1099-06-ES: Farm Boy Inc. (Applicant) v. Director of Employment Standards (Respondent) *(Withdrawn)*

1243-06-ES: Billy's Appliances Ltd. (Applicant) v. Raymond J. Raymond and Director of Employment Standards (Respondents) *(Dismissed)*

1437-06-ES: Kerry Samples (Applicant) v. Concord Food Center Oak Ridges Food Market and Director of Employment Standards (Respondents) *(Withdrawn)*

1711-06-ES: Tony Chun a Director of MediaDigm Technology Inc. (Applicant) v. Wayne Sung and Director of Employment Standards (Respondents) *(Withdrawn)*

1730-06-ES: Josef Savanda (Applicant) v. Cooling Tower Maintenance Inc., Director of Employment Standards (Respondents) *(Withdrawn)*

2077-06-ES: Na So Law (Applicant) v. Toys 'R' Us (Canada) Ltd., and Director of Employment Standards (Respondents) *(Dismissed)*

2116-06-ES: Marla's Inc. (Applicant) v. Sonia Bernardino and, Director of Employment Standards (Respondents) *(Withdrawn)*

2189-06-ES ; 2190-06-ES : La Bella Italia Ristorante Inc. (Applicant) v. Varinder Chopra, Director of Employment Standards (Respondents) ; La Bella Italia Ristorante Inc. (Applicant) v. Brian Solis Villalobos, Director of Employment Standards (Respondents) *(Terminated)*

2271-06-ES: Jeffery Gayle (Applicant) v. The Faneuil Group Inc. and Director of Employment Standards (Respondents) *(Terminated)*

2474-06-ES: Zeenat Auckbaraullee (Applicant) v. Moneris Solutions Corporation, Director of Employment Standards (Respondents) *(Terminated)*

2564-06-ES: James Dean Bonneville (Applicant) v. IMT Corp. and Director of Employment Standards (Respondents) *(Terminated)*

2670-06-ES: Amadeo Flores (Applicant) v. Pinpoint Career Inc. o/a Armor Industrial and Director of Employment Standards (Respondents) *(Terminated)*

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

3643-01-HS: Ministry of Natural Resources (Applicant) v. Stephan Dubuc, Bill Wilhem, Inspector, Ministry of Labour, Ontario Public Service Employees Union (Respondents) *(Withdrawn)*

0053-04-HS: Ontario Public Service Employees Union, Local 530 (Applicant) v. Ministry of Public Safety and Security, and, Rick Richmond and Rosalind Crawford, Inspectors (Respondents) *(Withdrawn)*

3039-04-HS: Great Atlantic and Pacific Company of Canada, Limited (Applicant) v. Melissa Trumble and, Tracy Kelly, Inspector (Respondents) *(Withdrawn)*

0057-06-HS: Cornelius Pools Corp (Applicant) v. International Association of Machinists and Aerospace Workers, Shelly Speir, Inspector (Respondents) *(Terminated)*

1474-06-HS: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Power-Tek Electrical Services Inc., and, Lynn McNabb, Inspector (Respondents) *(Withdrawn)*

1607-06-HS: Ontario Public Service Employees Union (Applicant) v. The Ministry of Solicitor General and Correctional Services, Inspector, Diane Hannah (Respondents) *(Withdrawn)*

1622-06-HS: C.A.W. Local 707 (Applicant) v. Ford Motor Company, Doug Kariam, Inspector (Respondents) *(Withdrawn)*

1684-06-HS: Sharon Fontaine (Applicant) v. Avenue II Community Program Services (Thunder Bay) Incorporated, Douglas Cettina, Inspector (Respondents) *(Dismissed)*

1759-06-HS: Xstrata (Nickel) (Applicant) v. CAW Local 598, Dan Methe, Inspector (Respondents) *(Withdrawn)*

2230-06-HS: Dofasco Inc. (Applicant) v. Steven Papple, Inspector (Respondent) *(Withdrawn)*

2314-06-HS: Ministry of Community Safety and Correctional Services (Applicant) v. Karen Sullivan, Robert Anthony, Inspector (Respondents) *(Dismissed)*

2851-06-HS: Humber River Regional Hospital (Applicant) v. Service Employees International Union, Local 1.on, Ontario Public Service Employees Union, Ontario Nurses Association, Shela Mirza, Inspector (Respondents) *(Dismissed)*

APPLICATION UNDER THE AMBULANCE SERVICES COLLECTIVE BARGAINING ACT

2950-06-M: Service Employees International Union Local 1.on (Applicant) v. Corporation of the County of Lambton (Respondent) *(Granted)*

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

3597-05-U: Eugeniusz Gorski (Applicant) v. Sheet Metal Workers' International Association, Local 504 (Respondent) v. Douro Roofing & Sheet Metal Contractors Ltd. (Intervenor) *(Dismissed)*

3916-05-U: Melat Negussie Minalu and Qianyi (Cindy)Tan (Applicant) v. United Food and Commercial Workers Canada, Local 1000A (Respondent) v. Power Packaging Company (Intervenor) *(Dismissed)*

4168-05-ES; 4170-05-ES: Linda Hummel (Applicant) v. North Bay Day Care Centre, Director of Employment Standards (Respondents); Jane McRae-Piercey (Applicant) v. North Bay Day Care Centre, Director of Employment Standards (Respondents) *(Granted)*

1356-06-ES: Custom Specialties Inc. (Applicant) v. Michael Leberge and Director of Employment Standards (Respondents) *(Dismissed)*

CASE LISTING JANUARY 2007

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JANUARY 2007

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0926-04-R: The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Hydro One Networks Inc. (Respondent) v. Electrical Power Systems Construction Association, Labourers' International Union of North America, Ontario Provincial District Council, Power Workers' Union Canadian Union of Public Employees, C.L.C. Local 1000 (Intervenors)

Unit: "all employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities. * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses: - construction of new facilities - additions to existing facilities - major - modifications - rehabilitation - reconstruction of existing facilities For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations. The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for: (a) the supply of aggregate and concrete used in the construction of said facilities: and (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers. The term EMPLOYEE shall include all employees of the Responding Party in the following classifications: Carpenter (includes Timberman, Cribman, Sawfiler and Pile Driver) Carpenter Welder and Burner Diver Diver Welder and Burner Acoustic and Drywall Worker Acoustic and Drywall Welder and Burner Resilient Floor Worker and Carpet Layer Subforeman Apprentice Pile Driver Welder The term EMPLOYEE SHALL NOT INCLUDE CARPENTERS EMPLOYED by the Responding Party if it is signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement. FOREMAN shall include all foremen between the ranks of, but not including, working foreman and general foreman, save and except Carpenter foremen employed by the Responding Party if it is signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement." (48 employees in unit)

1084-06-R: Canadian Union of Skilled Workers (Applicant) v. Hydro One Inc. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of Hydro One Inc. in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, in all sectors of the construction industry, save and except superintendents and persons above the rank of superintendent and persons for whom the applicant or another trade union hold subsisting bargaining rights as of July 5, 2006" (4 employees in unit)

1727-06-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. 1370352 Ontario Ltd. o/a J.J. Interior Contracting (Respondent)

Unit: "all painters and painters' apprentices in the employ of 1370352 Ontario Ltd. o/a J.J. Interior Contracting in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all painters and painters' apprentices in the employ of 1370352 Ontario Ltd. o/a J.J. Interior Contracting in all sectors of the construction industry in the County of Peterborough (except for the geographic Township of Cavan), the County of

Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit) *(Clarity Note)*

2932-06-R: Christian Labour Association of Canada (Applicant) v. Optimum Mechanical Solutions Inc. (Respondent)

Unit: "all journeyman and apprentice plumbers and all journeyman and apprentice refrigeration mechanics in the employ of Optimum Mechanical Solutions Inc. in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman, and employees for which any trade union held bargaining rights as of December 15, 2006" (6 employees in unit)

2974-06-R: Brick and Allied Craft Union of Canada (Applicant) v. Oakdale Drywall & Acoustics Ltd. (Respondent)

Unit: "all bricklayers and bricklayers' apprentices, and stonemasons and stonemasons' apprentices in the employ of the responding party in all sectors of the construction industry in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non working foreman" (2 employees in unit)

2981-06-R: Construction Workers Local 53, affiliated with Christian Labour Association of Canada (Applicant) v. JB+V Abatements Ltd. (Respondent)

Unit: "all construction labourers in the employ of JB+V Abatements Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2990-06-R: Brick and Allied Craft Union of Canada (Applicant) v. J.G.-Benchmark Corp. (Respondent)

Unit: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of J.G.-Benchmark Corp. in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, in all sectors of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

3147-06-R: Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Phil Groves Sewer Services Inc. (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment and those primarily engaged in the repairing or maintaining of same and all construction labourers in the employ of Phil Groves Sewer Services Inc. in all sectors of the construction industry in the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non working foreman" (6 employees in unit)

3148-06-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. All Services Incorporated and/or Coatings Removal Application Services Inc. (Respondent)

Unit: "all construction labourers in the employ of All Services Incorporated and/or Coatings Removal Application Services Inc. in all sectors of the construction industry in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional

County of Haliburton, other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

3267-06-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Colin Campbell c.o.b. as Croteas Drywall (Respondent)

Unit: "all painters and painters' apprentices in the employ of Colin Campbell c.o.b. as Croteas Drywall in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all painters and painters' apprentices in the employ of Colin Campbell c.o.b. as Croteas Drywall in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) *(Clarity Note)*

Bargaining Agents Certified Subsequent to Vote

3448-03-R: Labourers' International Union North America, Ontario Provincial District Council (Applicant) v. Ontario Power Generation Inc. (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Labourers' International Union of North America, International Union of Operating Engineers, Electrical Power Systems Construction Association, Power Workers' Union Canadian Union of Public Employees, C.L.C. Local 1000 (Intervenors)

Unit: "all employees and foremen of Ontario Power Generation Inc. as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities. * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses: - construction of new facilities - additions to existing facilities - major - modifications - rehabilitation - reconstruction of existing facilities. For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations. The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for: (a) the supply of aggregate and concrete used in the construction of said facilities; and (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers. The term EMPLOYEE shall include all employees of the Responding Party in the classifications set out below: Group I Watchman Group II Labourer Heaterman Power Sweeper Operator Siamese Blowgun Operator Carpenter Helper Flagman Signalman Spotter Janitorial Cleaner (Construction Site) Area Captain (BHWP) Group III Formworker (Lakeview and Pickering Projects only) Group IV Conveyor Belt Attendant Scaler Wrecker - Demolition of Complete Buildings Yardman - Used Building Materials Form Stripper Powderman Helper Air Trac Driller Helper Bricklayer Helper/Mason Tender Stressing Operating Helper - Post-Tensioning and Prestressing Caulker including Tile and Concrete Pipe Grouter Operator (not machine) Portable Compressor Operator Small Pump Operator Pipe Layer Small Mixer Operator Group V Concrete Worker Floatman Puddler Screedman Mortarman Group VI Air Tool Operator Concrete Core Drill Machine Operator Jackhammer Operator Tamper Operator Chainsaw Operator Vibrator Operator Electrical Tool Operator Pressurized Grouterman Bomag Operator Scootcrete Operator Chipping Hammer Operator Concrete Breaker Jackleg Operator Rocksplitter Operator Farm Tractor Operator Tool Crib Attendant Building Labourer (Lines and Stations only) Stump Cutter Operator Stress Operator Post-Tensioning and Prestressing Welder - Post-Tensioning and Prestressing Group VII Powderman Group VIII Air Trac/Hydraulic Drills and Self-Propelled Hydraulic Drills Group IX Diamond Driller The term EMPLOYEE shall not include Labourers employed by an Employer signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement. The term FOREMAN shall include all foremen between the ranks of, but not including, working foreman and general foreman, save and except those described hereunder. Labourer foremen employed by an Employer signatory to the National

Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement." (40 employees in unit) *(Clarity Note)*

Number of names of persons on revised voters' list	42
Number of persons who cast ballots	39
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	39
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	38
Number of ballots marked in favour of Intervenor	0
Number of ballots segregated and not counted	0

3450-03-R: Labourers' International Union North America Ontario Provincial District Council (Applicant) v. Bruce Power LP (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Labourers' International Union of North America, International Union of Operating Engineers, Electrical Power Systems Construction Association (Intervenors)

Unit: "all employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities. * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses: - construction of new facilities - additions to existing facilities - major - modifications - rehabilitation - reconstruction of existing facilities For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations. The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for: (a) the supply of aggregate and concrete used in the construction of said facilities; and (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers. The term EMPLOYEE shall include all employees of the Responding Party in the classifications set out below: Group I Watchman Group II Labourer Heaterman Power Sweeper Operator Siamese Blowgun Operator Carpenter Helper Flagman Signalman Spotter Janitorial Cleaner (Construction Site) Area Captain (BHWP) Group III Formworker (Lakeview and Pickering Projects only) Group IV Conveyor Belt Attendant Scaler Wrecker - Demolition of Complete Buildings Yardman - Used Building Materials Form Stripper Powderman Helper Air Trac Driller Helper Bricklayer Helper Mason Tender Stressing Operating Helper - Post-Tensioning and Prestressing Caulker including Tile and Concrete Pipe Grouter Operator (not machine) Portable Compressor Operator Small Pump Operator Pipe Layer Small Mixer Operator Group V Concrete Worker Floatman Puddler Screedman Mortarman Group VI Air Tool Operator Concrete Core Drill Machine Operator Jackhammer Operator Tamper Operator Chainsaw Operator Vibrator Operator Electrical Tool Operator Pressurized Grouterman Bomag Operator Scootcrete Operator Chipping Hammer Operator Concrete Breaker Jackleg Operator Rocksplitter Operator Farm Tractor Operator Tool Crib Attendant Building Labourer (Lines and Stations only) Stump Cutter Operator Stress Operator Post-Tensioning and Prestressing Welder - Post-Tensioning and Prestressing Group VII Powderman Group VIII Air Trac/Hydraulic Drills and Self-Propelled Hydraulic Drills Group IX Diamond Driller The term EMPLOYEE shall not include Labourers employed by an Employer signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement. The term FOREMAN shall include all foremen between the ranks of, but not including, working foreman and general foreman, save and except those described hereunder. Labourer foremen employed by an Employer signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement." (45 employees in unit) *(Clarity Note)*

Number of names of persons on revised voters' list	49
Number of persons who cast ballots	43

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	42
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	41
Number of ballots marked in favour of Intervenor	1
Number of ballots segregated and not counted	1

3457-03-R: Labourers' International Union North America, Ontario Provincial District Council (Applicant) v. Hydro One Inc. and Hydro One Networks Inc. (Respondent) v. The United Brotherhood of Carpenters and Joiners of America, Labourers' International Union of North America, International Union of Operating Engineers, Electrical Power Systems Construction Association, Power Workers' Union Canadian Union of Public Employees, C.L.C. Local 1000 (Intervenors)

Unit: "all employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities. * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses: - construction of new facilities - additions to existing facilities - major - modifications - rehabilitation - reconstruction of existing facilities For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations. The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for: (a) the supply of aggregate and concrete used in the construction of said facilities; and (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers. The term EMPLOYEE shall include all employees of the Responding Party in the classifications set out below: Group I Watchman Group II Labourer Heaterman Power Sweeper Operator Siamese Blowgun Operator Carpenter Helper Flagman Signalman Spotter Janitorial Cleaner (Construction Site) Area Captain (BHWP) Group III Formworker (Lakeview and Pickering Projects only) Group IV Conveyor Belt Attendant Scaler Wrecker - Demolition of Complete Buildings Yardman - Used Building Materials Form Stripper Powderman Helper Air Trac Driller Helper Bricklayer Helper/Mason Tender Stressing Operating Helper - Post-Tensioning and Prestressing Caulker including Tile and Concrete Pipe Grouter Operator (not machine) Portable Compressor Operator Small Pump Operator Pipe Layer Small Mixer Operator Group V Concrete Worker Floatman Puddler Screedman Mortarman Group VI Air Tool Operator Concrete Core Drill Machine Operator Jackhammer Operator Tamper Operator Chainsaw Operator Vibrator Operator Electrical Tool Operator Pressurized Grouterman Bomag Operator Scootcrete Operator Chipping Hammer Operator Concrete Breaker Jackleg Operator Rocksplitter Operator Farm Tractor Operator Tool Crib Attendant Building Labourer (Lines and Stations only) Stump Cutter Operator Stress Operator Post-Tensioning and Prestressing Welder - Post-Tensioning and Prestressing Group VII Powderman Group VIII Air Trac/Hydraulic Drills and Self-Propelled Hydraulic Drills Group IX Diamond Driller The term EMPLOYEE shall not include Labourers employed by an Employer signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement. The term FOREMAN shall include all foremen between the ranks of, but not including, working foreman and general foreman, save and except those described hereunder. Labourer foremen employed by an Employer signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement." (9 employees in unit) *(Clarity Note)*

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on	3

voters' list	
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked in favour of Intervenor	0
Number of ballots segregated and not counted	3

3502-03-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Crossby-Dewar Projects Inc. (Respondent) v. Labourers' International Union of North America, United Brotherhood of Carpenters and Joiners of America, International Union of Operating Engineers, Electrical Power Systems Construction Association, Power Workers' Union Canadian Union of Public Employees, C.L.C. Local 1000 (Intervenors)

Unit: "all employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities. * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses: - construction of new facilities - additions to existing facilities - major - modifications - rehabilitation - reconstruction of existing facilities For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations. The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for: (a) the supply of aggregate and concrete used in the construction of said facilities; and (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers. The term EMPLOYEE shall include all employees of the Responding Party in the classifications set out below: Group I Watchman Group II Labourer Heaterman Power Sweeper Operator Siamese Blowgun Operator Carpenter Helper Flagman Signalman Spotter Janitorial Cleaner (Construction Site) Area Captain (BHWP) Group III Formworker (Lakeview and Pickering Projects only) Group IV Conveyor Belt Attendant Scaler Wrecker - Demolition of Complete Buildings Yardman - Used Building Materials Form Stripper Powderman Helper Air Trac Driller Helper Bricklayer Helper/Mason Tender Stressing Operating Helper - Post-Tensioning and Prestressing Caulker including Tile and Concrete Pipe Grouter Operator (not machine) Portable Compressor Operator Small Pump Operator Pipe Layer Small Mixer Operator Group V Concrete Worker Floatman Puddler Screedman Mortarman Group VI Air Tool Operator Concrete Core Drill Machine Operator Jackhammer Operator Tamper Operator Chainsaw Operator Vibrator Operator Electrical Tool Operator Pressurized Grouterman Bomag Operator Scootcrete Operator Chipping Hammer Operator Concrete Breaker Jackleg Operator Rocksplitter Operator Farm Tractor Operator Tool Crib Attendant Building Labourer (Lines and Stations only) Stump Cutter Operator Stress Operator Post-Tensioning and Prestressing Welder - Post-Tensioning and Prestressing Group VII Powderman Group VIII Air Trac Hydraulic Drills and Self-Propelled Hydraulic Drills Group IX Diamond Driller The term EMPLOYEE shall not include Labourers employed by an Employer signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement. The term FOREMAN shall include all foremen between the ranks of, but not including, working foreman and general foreman, save and except those described hereunder. Labourer foremen employed by an Employer signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement." (101 employees in unit) *(Clarity Note)*

Number of names of persons on revised voters' list	100
Number of persons who cast ballots	95
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	90
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	5
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	90
Number of ballots marked in favour of Intervenor	2

Number of ballots segregated and not counted	3

0094-04-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Curran Contractors (Respondent) v. Electrical Power Systems Construction Association (Intervenor)

Unit: "all employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities. * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses: - construction of new facilities - additions to existing facilities - major - modifications - rehabilitation - reconstruction of existing facilities For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations. The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for: (a) the supply of aggregate and concrete used in the construction of said facilities; and (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers. The term EMPLOYEE shall include all employees of the Responding Party in the classifications set out below: Group I Watchman Group II Labourer Heaterman Power Sweeper Operator Siamese Blowgun Operator Carpenter Helper Flagman Signalman Spotter Janitorial Cleaner (Construction Site) Area Captain (BHWP) Group III Formworker (Lakeview and Pickering Projects only) Group IV Conveyor Belt Attendant Scaler Wrecker - Demolition of Complete Buildings Yardman - Used Building Materials Form Stripper Powderman Helper Air Trac Driller Helper Bricklayer Helper Mason Tender Stressing Operating Helper - Post-Tensioning and Prestressing Caulker including Tile and Concrete Pipe Grouter Operator (not machine) Portable Compressor Operator Small Pump Operator Pipe Layer Small Mixer Operator Group V Concrete Worker Floatman Puddler Screedman Mortarman Group VI Air Tool Operator Concrete Core Drill Machine Operator Jackhammer Operator Tamper Operator Chainsaw Operator Vibrator Operator Electrical Tool Operator Pressurized Grouterman Bomag Operator Scootcrete Operator Chipping Hammer Operator Concrete Breaker Jackleg Operator Rocksplitter Operator Farm Tractor Operator Tool Crib Attendant Building Labourer (Lines and Stations only) Stump Cutter Operator Stress Operator Post-Tensioning and Prestressing Welder - Post-Tensioning and Prestressing Group VII Powderman Group VIII Air Trac Hydraulic Drills and Self-Propelled Hydraulic Drills Group IX Diamond Driller The term EMPLOYEE shall not include Labourers employed by an Employer signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement. The term FOREMAN shall include all foremen between the ranks of, but not including, working foreman and general foreman, save and except those described hereunder. Labourer foremen employed by an Employer signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement." (3 employees in unit) *(Clarity Note)*

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	
Number of ballots marked in favour of applicant	3
Number of ballots marked in favour of Intervenor	0
Number of ballots segregated and not counted	0

0096-04-R: Labourers' International Union of North America Ontario Provincial District Council (Applicant) v. Comstock Canada Ltd. (Respondent) v. Electrical Power Systems Construction Association (Intervenor)

Unit: "all employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc.

(OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities. * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses: - construction of new facilities - additions to existing facilities - major - modifications - rehabilitation - reconstruction of existing facilities For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations. The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for: (a) the supply of aggregate and concrete used in the construction of said facilities; and (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers. The term EMPLOYEE shall include all employees of the Responding Party in the classifications set out below: Group I Watchman Group II Labourer Heaterman Power Sweeper Operator Siamese Blowgun Operator Carpenter Helper Flagman Signalman Spotter Janitorial Cleaner (Construction Site) Area Captain (BHWP) Group III Formworker (Lakeview and Pickering Projects only) Group IV Conveyor Belt Attendant Scaler Wrecker - Demolition of Complete Buildings Yardman - Used Building Materials Form Stripper Powderman Helper Air Trac Driller Helper Bricklayer Helper/Mason Tender Stressing Operating Helper - Post-Tensioning and Prestressing Caulker including Tile and Concrete Pipe Grouter Operator (not machine) Portable Compressor Operator Small Pump Operator Pipe Layer Small Mixer Operator Group V Concrete Worker Floatman Puddler Screedman Mortarman Group VI Air Tool Operator Concrete Core Drill Machine Operator Jackhammer Operator Tamper Operator Chainsaw Operator Vibrator Operator Electrical Tool Operator Pressurized Grouterman Bomag Operator Scootcrete Operator Chipping Hammer Operator Concrete Breaker Jackleg Operator Rocksplitter Operator Farm Tractor Operator Tool Crib Attendant Building Labourer (Lines and Stations only) Stump Cutter Operator Stress Operator Post-Tensioning and Prestressing Welder - Post-Tensioning and Prestressing Group VII Powderman Group VIII Air Trac/Hydraulic Drills and Self-Propelled Hydraulic Drills Group IX Diamond Driller The term EMPLOYEE shall not include Labourers employed by an Employer signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement. The term FOREMAN shall include all foremen between the ranks of, but not including, working foreman and general foreman, save and except those described hereunder. Labourer foremen employed by an Employer signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement." (6 employees in unit)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of applicant	9
Number of ballots marked in favour of Intervenor	1
Number of ballots segregated and not counted	0

0112-04-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Babcock & Wilcox Canada Ltd. (Respondent) v. Electrical Power Systems Construction Association (Intervenor)

Unit: "all employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities. * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses: - construction of new facilities - additions to existing facilities - major - modifications - rehabilitation - reconstruction of existing facilities For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations. The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for: (a) the supply of aggregate and concrete used in the construction of said facilities; and (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers. The term EMPLOYEE shall include all employees of the Responding Party in the classifications set out below: Group I Watchman Group II Labourer Heaterman Power Sweeper Operator Siamese Blowgun Operator Carpenter Helper Flagman Signalman Spotter Janitorial Cleaner (Construction Site) Area Captain (BHWP) Group III Formworker (Lakeview and Pickering Projects only) Group IV Conveyor Belt Attendant Scaler Wrecker - Demolition of Complete Buildings Yardman - Used Building Materials Form Stripper Powderman Helper Air Trac Driller Helper Bricklayer Helper/Mason Tender Stressing Operating Helper - Post-Tensioning and Prestressing Caulker including Tile and Concrete Pipe Grouter Operator (not machine) Portable Compressor Operator Small Pump Operator Pipe Layer Small Mixer Operator Group V Concrete Worker Floatman Puddler Screedman Mortarman Group VI Air Tool Operator Concrete Core Drill Machine Operator Jackhammer Operator Tamper Operator Chainsaw Operator Vibrator Operator Electrical Tool Operator Pressurized Grouterman Bomag Operator Scootcrete Operator Chipping Hammer Operator Concrete Breaker Jackleg Operator Rocksplitter Operator Farm Tractor Operator Tool Crib Attendant Building Labourer (Lines and Stations only) Stump Cutter Operator Stress Operator Post-Tensioning and Prestressing Welder - Post-Tensioning and Prestressing Group VII Powderman Group VIII Air Trac Hydraulic Drills and Self-Propelled Hydraulic Drills Group IX Diamond Driller The term EMPLOYEE shall not include Labourers employed by an Employer signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement. The term FOREMAN shall include all foremen between the ranks of, but not including, working foreman and general foreman, save and except those described hereunder. Labourer foremen employed by an Employer signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement." (3 employees in unit)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of applicant	3
Number of ballots marked in favour of Intervenor	0
Number of ballots segregated and not counted	0

0113-04-R: Labourers' International Union of North America Ontario Provincial District Council (Applicant) v. Black & McDonald Limited (Respondent) v. Electrical Power Systems Construction Association (Intervenor)

Unit: "all employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities. * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses: - construction of new facilities - additions to existing facilities - major - modifications - rehabilitation - reconstruction of existing facilities For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations. The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for: (a) the supply of aggregate and concrete used in the construction of said facilities; and (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers. The term EMPLOYEE shall include all employees of the Responding Party in the classifications set out below: Group I Watchman Group II Labourer Heaterman Power Sweeper Operator Siamese Blowgun Operator Carpenter Helper Flagman Signalman Spotter Janitorial Cleaner (Construction Site) Area Captain (BHWP) Group III Formworker (Lakeview and Pickering Projects only) Group IV Conveyor Belt Attendant Scaler Wrecker - Demolition of Complete Buildings Yardman - Used Building Materials Form Stripper Powderman Helper Air Trac Driller Helper Bricklayer Helper/Mason Tender Stressing Operating Helper - Post-Tensioning and Prestressing Caulker including

Tile and Concrete Pipe Grouter Operator (not machine) Portable Compressor Operator Small Pump Operator Pipe Layer Small Mixer Operator Group V Concrete Worker Floatman Puddler Screedman Mortarman Group VI Air Tool Operator Concrete Core Drill Machine Operator Jackhammer Operator Tamper Operator Chainsaw Operator Vibrator Operator Electrical Tool Operator Pressurized Grouterman Bomag Operator Scootcrete Operator Chipping Hammer Operator Concrete Breaker Jackleg Operator Rocksplitter Operator Farm Tractor Operator Tool Crib Attendant Building Labourer (Lines and Stations only) Stump Cutter Operator Stress Operator Post-Tensioning and Prestressing Welder - Post-Tensioning and Prestressing Group VII Powderman Group VIII Air Trac/Hydraulic Drills and Self-Propelled Hydraulic Drills Group IX Diamond Driller The term EMPLOYEE shall not include Labourers employed by an Employer signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement. The term FOREMAN shall include all foremen between the ranks of, but not including, working foreman and general foreman, save and except those described hereunder. Labourer foremen employed by an Employer signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement." (13 employees in unit)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked in favour of Intervenor	0
Number of ballots segregated and not counted	0

0114-04-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Power Generation Services Division of Siemens Canada Limited (Respondent) v. Electrical Power Systems Construction Association (Intervenor)

Unit: "all employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities. * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses: - construction of new facilities - additions to existing facilities - major - modifications - rehabilitation - reconstruction of existing facilities For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations. The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for: (a) the supply of aggregate and concrete used in the construction of said facilities; and (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers. The term EMPLOYEE shall include all employees of the Responding Party in the classifications set out below: Group I Watchman Group II Labourer Heaterman Power Sweeper Operator Siamese Blowgun Operator Carpenter Helper Flagman Signalman Spotter Janitorial Cleaner (Construction Site) Area Captain (BHWP) Group III Formworker (Lakeview and Pickering Projects only) Group IV Conveyor Belt Attendant Scaler Wrecker - Demolition of Complete Buildings Yardman - Used Building Materials Form Stripper Powderman Helper Air Trac Driller Helper Bricklayer Helper/Mason Tender Stressing Operating Helper - Post-Tensioning and Prestressing Caulker including Tile and Concrete Pipe Grouter Operator (not machine) Portable Compressor Operator Small Pump Operator Pipe Layer Small Mixer Operator Group V Concrete Worker Floatman Puddler Screedman Mortarman Group VI Air Tool Operator Concrete Core Drill Machine Operator Jackhammer Operator Tamper Operator Chainsaw Operator Vibrator Operator Electrical Tool Operator Pressurized Grouterman Bomag Operator Scootcrete Operator Chipping Hammer Operator Concrete Breaker Jackleg Operator Rocksplitter Operator Farm Tractor Operator Tool Crib Attendant Building Labourer (Lines and Stations only) Stump Cutter Operator Stress Operator Post-Tensioning and

Prestressing Welder - Post-Tensioning and Prestressing Group VII Powderman Group VIII Air Trac/Hydraulic Drills and Self-Propelled Hydraulic Drills Group IX Diamond Driller The term EMPLOYEE shall not include Labourers employed by an Employer signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement. The term FOREMAN shall include all foremen between the ranks of, but not including, working foreman and general foreman, save and except those described hereunder. Labourer foremen employed by an Employer signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement." (2 employees in unit) *(Clarity Note)*

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of Intervenor	0
Number of ballots segregated and not counted	0

0506-04-R: Millwright Regional Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ontario Power Generation Inc. (Respondent) v. Electrical Power Systems Construction Association, Power Workers' Union Canadian Union of Public Employees, C.L.C. Local 1000 (Intervenors)

Unit: "all employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities. * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses: - construction of new facilities - additions to existing facilities - major - modifications - rehabilitation - reconstruction of existing facilities For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations. The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for: (a) the supply of aggregate and concrete used in the construction of said facilities; and (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers. The term "employee" shall include all employees of the Responding Party in the classification of Millwright, which shall include welders, burners, subforemen, journeymen and apprentices employed in the Millwright Trade. The term "foreman" shall include all millwright foreman of the Responding Party between the ranks, but not including, working foreman and general foreman." (40 employees in unit)

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	37
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	37
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	37
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

0507-04-R: Millwright Regional Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bruce Power LP (Respondent) v. Electrical Power Systems Construction Association, Power Workers' Union Canadian Union of Public Employees, C.L.C. Local 1000 (Intervenors)

Unit: "all employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities. * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses: - construction of new facilities - additions to existing facilities - major - modifications - rehabilitation - reconstruction of existing facilities For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations. The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for: (a) the supply of aggregate and concrete used in the construction of said facilities; and (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers. The term EMPLOYEE shall include all employees of the Responding Party in the classification of Millwright, which shall include welders, burners, subforemen, journeymen and apprentices employed in the Millwright Trade. The term FOREMAN shall include all millwright foreman of the Responding Party between the ranks, but not including, working foreman and general foreman." (18 employees in unit)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

0527-04-R: Millwright Regional Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Power Generation Services Division of Siemens Canada Limited (Respondent) v. Electrical Power Systems Construction Association (Intervenor)

Unit: "all employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities. * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses: - construction of new facilities - additions to existing facilities - major - modifications - rehabilitation - reconstruction of existing facilities For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations. The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for: (a) the supply of aggregate and concrete used in the construction of said facilities; and (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers. The term EMPLOYEE shall include all employees of the Responding Party in the classification of Millwright, which shall include welders, burners, subforemen, journeymen and apprentices employed in the Millwright Trade. The term FOREMAN shall include all millwright foreman of the Responding Party between the ranks, but not including, working foreman and general foreman." (14 employees in unit)

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	17
Number of ballots marked in favour of Intervenor	0
Number of ballots segregated and not counted	0

0529-04-R: Millwright Regional Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Black & McDonald Limited (Respondent) v. Electrical Power Systems Construction Association (Intervenor)

Unit: "all employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities. * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses: - construction of new facilities - additions to existing facilities - major - modifications - rehabilitation - reconstruction of existing facilities For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations. The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for: (a) the supply of aggregate and concrete used in the construction of said facilities; and (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers. The term EMPLOYEE shall include all employees of the Responding Party in the classification of Millwright, which shall include welders, burners, subforemen, journeymen and apprentices employed in the Millwright Trade. The term FOREMAN shall include all millwright foreman of the Responding Party between the ranks, but not including, working foreman and general foreman." (31 employees in unit)

Number of names of persons on revised voters' list	0
Number of persons who cast ballots	31
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	31
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	31
Number of ballots marked in favour of Intervenor	0
Number of ballots segregated and not counted	0

0531-04-R: Millwright Regional Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Comstock Canada Ltd. (Respondent) v. Electrical Power Systems Construction Association, Brighton Beach Power Ltd. (Intervenors)

Unit: "all employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities. * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses: -

construction of new facilities - additions to existing facilities - major - modifications - rehabilitation - reconstruction of existing facilities For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations. The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for: (a) the supply of aggregate and concrete used in the construction of said facilities; and (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers. The term EMPLOYEE shall include all employees of the Responding Party in the classification of Millwright, which shall include welders, burners, subforemen, journeymen and apprentices employed in the Millwright Trade. The term FOREMAN shall include all millwright foreman of the Responding Party between the ranks, but not including, working foreman and general foreman." (5 employees in unit) *(Clarity Note)*

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked in favour of Intervenor	0
Number of ballots segregated and not counted	3

0532-04-R: Millwright Regional Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Aecon Industrial A Division of Aecon Construction Group Inc. (Respondent) v. Electrical Power Systems Construction Association (Intervenor)

Unit: "all employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities. * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses: - construction of new facilities - additions to existing facilities - major - modifications - rehabilitation - reconstruction of existing facilities For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations. The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for: (a) the supply of aggregate and concrete used in the construction of said facilities; and (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers. The term EMPLOYEE shall include all employees of the Responding Party in the classification of Millwright, which shall include welders, burners, subforemen, journeymen and apprentices employed in the Millwright Trade. The term FOREMAN shall include all millwright foreman of the Responding Party between the ranks, but not including, working foreman and general foreman." (17 employees in unit)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	11

Number of ballots segregated and not counted	4

0533-04-R: Millwright Regional Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Babcock & Wilcox Canada Ltd. (Respondent) v. Electrical Power Systems Construction Association (Intervenor)

Unit: "all employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities. * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses: - construction of new facilities - additions to existing facilities - major - modifications - rehabilitation - reconstruction of existing facilities For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations. The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for: (a) the supply of aggregate and concrete used in the construction of said facilities; and (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers. The term EMPLOYEE shall include all employees of the Responding Party in the classification of Millwright, which shall include welders, burners, subforemen, journeymen and apprentices employed in the Millwright Trade. The term FOREMAN shall include all millwright foreman of the Responding Party between the ranks, but not including, working foreman and general foreman." (11 employees in unit)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked in favour of Intervenor	0
Number of ballots segregated and not counted	0

0534-04-R: Millwright Regional Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Tomlinson Steel Limited (Respondent) v. Electrical Power Systems Construction Association (Intervenor)

Unit: "all employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities. * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses: - construction of new facilities - additions to existing facilities - major - modifications - rehabilitation - reconstruction of existing facilities For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations. The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for: (a) the supply of aggregate and concrete used in the construction of said facilities; and (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers. The term EMPLOYEE shall include all employees of the Responding Party in the classification of Millwright, which shall include welders, burners, subforemen, journeymen and apprentices employed in the Millwright Trade. The term

FOREMAN shall include all millwright foreman of the Responding Party between the ranks, but not including, working foreman and general foreman." (2 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of Intervenor	0
Number of ballots segregated and not counted	0

0917-04-R: The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bruce Power LP (Respondent) v. Electrical Power Systems Construction Association, Power Workers' Union Canadian Union of Public Employees, C.L.C. Local 1000, Labourers' International Union of North America, Ontario Provincial District Council (Intervenors)

Unit: "all employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities. * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses: - construction of new facilities - additions to existing facilities - major - modifications - rehabilitation - reconstruction of existing facilities For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations. The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for: (a) the supply of aggregate and concrete used in the construction of said facilities; and (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers. The term EMPLOYEE shall include all employees of the Responding Party in the following classifications: Carpenter (includes Timberman, Cribman, Sawfiler and Pile Driver) Carpenter Welder and Burner Diver Diver Welder and Burner Acoustic and Drywall Worker Acoustic and Drywall Welder and Burner Resilient Floor Worker and Carpet Layer Subforeman Apprentice Pile Driver Welder The term EMPLOYEE SHALL NOT INCLUDE CARPENTERS EMPLOYED by the Responding Party if it is signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement. FOREMAN shall include all foremen between the ranks of, but not including, working foreman and general foreman, save and except Carpenter foremen employed by the Responding Party if it is signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement." (54 employees in unit)

Number of names of persons on revised voters' list	47
Number of persons who cast ballots	46
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	44
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	45
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

0925-04-R: The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Crossby-Dewar Projects Inc. (Respondent) v. Electrical Power Systems Construction Association, Labourers' International Union of North America, Ontario Provincial District Council (Intervenors)

Unit: "all employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities. * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses: - construction of new facilities - additions to existing facilities - major - modifications - rehabilitation - reconstruction of existing facilities For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations. The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for: (a) the supply of aggregate and concrete used in the construction of said facilities; and (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers. The term EMPLOYEE shall include all employees of the Responding Party in the following classifications: Carpenter (includes Timberman, Cribman, Sawfiler and Pile Driver) Carpenter Welder and Burner Diver Diver Welder and Burner Acoustic and Drywall Worker Acoustic and Drywall Welder and Burner Resilient Floor Worker and Carpet Layer Subforeman Apprentice Pile Driver Welder The term EMPLOYEE SHALL NOT INCLUDE CARPENTERS EMPLOYED by the Responding Party if it is signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement. FOREMAN shall include all foremen between the ranks of, but not including, working foreman and general foreman, save and except Carpenter foremen employed by the Responding Party if it is signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement." (100 employees in unit)

Number of names of persons on revised voters' list	106
Number of persons who cast ballots	70
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	62
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	62
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	8

1026-04-R: Labourers' International Union of North America Ontario Provincial District Council (Applicant) v. F.D. Light & Power Ltd. o/a Dundas Drilling (Respondent) v. Electrical Power Systems Construction Association (Intervenor)

Unit: "all employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities. * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses: - construction of new facilities - additions to existing facilities - major - modifications - rehabilitation - reconstruction of existing facilities For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations. The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for: (a) the supply of aggregate and concrete used in the construction of said facilities; and (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers. The term

EMPLOYEE shall include all employees of the Responding Party in the classifications set out below: Group I Watchman Group II Labourer Heaterman Power Sweeper Operator Siamese Blowgun Operator Carpenter Helper Flagman Signalman Spotter Janitorial Cleaner (Construction Site) Area Captain (BHWP) Group III Formworker (Lakeview and Pickering Projects only) Group IV Conveyor Belt Attendant Scaler Wrecker - Demolition of Complete Buildings Yardman - Used Building Materials Form Stripper Powderman Helper Air Trac Driller Helper Bricklayer Helper/Mason Tender Stressing Operating Helper - Post-Tensioning and Prestressing Caulker including Tile and Concrete Pipe Grouter Operator (not machine) Portable Compressor Operator Small Pump Operator Pipe Layer Small Mixer Operator Group V Concrete Worker Floatman Puddler Screedman Mortarman Group VI Air Tool Operator Concrete Core Drill Machine Operator Jackhammer Operator Tamper Operator Chainsaw Operator Vibrator Operator Electrical Tool Operator Pressurized Grouterman Bomag Operator Scootcrete Operator Chipping Hammer Operator Concrete Breaker Jackleg Operator Rocksplitter Operator Farm Tractor Operator Tool Crib Attendant Building Labourer (Lines and Stations only) Stump Cutter Operator Stress Operator Post-Tensioning and Prestressing Welder - Post-Tensioning and Prestressing Group VII Powderman Group VIII Air Trac/Hydraulic Drills and Self-Propelled Hydraulic Drills Group IX Diamond Driller The term EMPLOYEE shall not include Labourers employed by an Employer signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement. The term FOREMAN shall include all foremen between the ranks of, but not including, working foreman and general foreman, save and except those described hereunder. Labourer foremen employed by an Employer signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement." (8 employees in unit)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of applicant	3

1045-04-R: Labourers' International Union of North America Ontario Provincial District Council (Applicant) v. John Hayman & Sons Co. Ltd. (Respondent) v. Electrical Power Systems Construction Association (Intervenor)

Unit: "all employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities. * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses: - construction of new facilities - additions to existing facilities - major - modifications - rehabilitation - reconstruction of existing facilities For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations. The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for: (a) the supply of aggregate and concrete used in the construction of said facilities; and (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers. The term EMPLOYEE shall include all employees of the Responding Party in the classifications set out below: Group I Watchman Group II Labourer Heaterman Power Sweeper Operator Siamese Blowgun Operator Carpenter Helper Flagman Signalman Spotter Janitorial Cleaner (Construction Site) Area Captain (BHWP) Group III Formworker (Lakeview and Pickering Projects only) Group IV Conveyor Belt Attendant Scaler Wrecker - Demolition of Complete Buildings Yardman - Used Building Materials Form Stripper Powderman Helper Air Trac Driller Helper Bricklayer Helper/Mason Tender Stressing Operating Helper - Post-Tensioning and Prestressing Caulker including Tile and Concrete Pipe Grouter Operator (not machine) Portable Compressor Operator Small Pump Operator Pipe Layer Small Mixer Operator Group V Concrete Worker Floatman Puddler Screedman Mortarman Group VI Air Tool Operator Concrete Core Drill Machine Operator Jackhammer Operator Tamper Operator Chainsaw Operator Vibrator Operator Electrical Tool Operator Pressurized Grouterman Bomag Operator Scootcrete Operator Chipping

Hammer Operator Concrete Breaker Jackleg Operator Rocksplitter Operator Farm Tractor Operator Tool Crib Attendant Building Labourer (Lines and Stations only) Stump Cutter Operator Stress Operator Post-Tensioning and Prestressing Welder - Post-Tensioning and Prestressing Group VII Powderman Group VIII Air Trac/Hydraulic Drills and Self-Propelled Hydraulic Drills Group IX Diamond Driller The term EMPLOYEE shall not include Labourers employed by an Employer signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement. The term FOREMAN shall include all foremen between the ranks of, but not including, working foreman and general foreman, save and except those described hereunder. Labourer foremen employed by an Employer signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement." (3 employees in unit)

Number of names of persons on revised voters' list	0
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of ballots marked in favour of applicant	3

1534-04-R: The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Comstock Canada Ltd. (Respondent) v. Electrical Power Systems Construction Association, Brighton Beach Power Ltd. (Intervenors)

Unit: "all employees and foremen of the Responding Party as defined below engaged in all construction industry work* performed in the electrical power systems sector in the Province of Ontario on Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP property for the bulk power system, save and except the building of commercial-type office facilities at urban locations remote from operating facilities. * the work performed is deemed to be under the responsibility of the Engineering and Construction Services Branch. The work encompasses: - construction of new facilities - additions to existing facilities - major - modifications - rehabilitation - reconstruction of existing facilities For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50kV), transmission stations, microwave and repeater stations. The work described above shall also include work on property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for: (a) the supply of aggregate and concrete used in the construction of said facilities; and (b) ancillary material yards which are defined as property acquired by Ontario Power Generation Inc. (OPGI), Hydro One and Bruce Power LP for the storage of materials to be used on a project by Employers. The term EMPLOYEE shall include all employees of the Responding Party in the following classifications: Carpenter (includes Timberman, Cribman, Sawfiler and Pile Driver) Carpenter Welder and Burner Diver Diver Welder and Burner Acoustic and Drywall Worker Acoustic and Drywall Welder and Burner Resilient Floor Worker and Carpet Layer Subforeman Apprentice Pile Driver Welder The term EMPLOYEE SHALL NOT INCLUDE CARPENTERS EMPLOYED by the Responding Party if it is signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement. FOREMAN shall include all foremen between the ranks of, but not including, working foreman and general foreman, save and except Carpenter foremen employed by the Responding Party if it is signatory to the National Agreement for Canada, Stacks-Chimneys-Silos, when performing work covered by the scope of that agreement." (13 employees in unit)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10

2890-05-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Belanger Construction (1981) Inc. (Respondent) v. International Union of Operating Engineers, Local 793, United Brotherhood of Carpenters and Joiners of America, Local 2486 (Intervenors)

Unit: "all employees of Belanger Construction (1981) Inc. engaged in highway maintenance pursuant to Ontario Ministry of Transportation contracts who work at and out of the Districts of Sudbury and Manitoulin, in the District of Algoma at and out of Elliott Lake, and in the District of Parry Sound at and out of Britt, save and except mechanics and welders, construction materials truck drivers, students employed during the school vacation period (one per yard), supervisors and persons above the rank of supervisor, office, clerical and sales staff" (91 employees in unit) *(Clarity Note)*

Number of names of persons on revised voters' list	78
Number of persons who cast ballots	78
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	129
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	70
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	5

0471-06-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Pyramid Paving (2006) Limited (Respondent)

Unit: "all construction labourers in the employ of Pyramid Paving (2006) Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all construction labourers in the employ of Pyramid Paving (2006) Limited in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

0726-06-R: International Association of Machinists and Aerospace Workers (Applicant) v. Hawthorne Security & Communications Inc. (Respondent)

Unit: "all employees of Hawthorne Security & Communications Inc. in the Town of Arnprior, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff" (6 employees in unit)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6

Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

1911-06-R: Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Applicant) v. Nanticoke Christian Senior Citizen Home Inc. o/a Parkview Meadows Retirement Village (Respondent)

Unit: "all employees employed by the responding party at Parkview Meadows Retirement Village, in the City of Townsend, save and except the Supervisors and those above the rank of Supervisor" (92 employees in unit)

Number of names of persons on revised voters' list	103
Number of persons who cast ballots	72
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	62
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	39
Number of ballots marked against applicant	23
Number of ballots segregated and not counted	10

2222-06-R: Canadian Union of Public Employees (Applicant) v. Links2Care (Respondent)

Unit: "all employees of Links2Care in the Regional Municipality of Halton save and except supervisors, persons holding the position of Coordinator 1, persons above the rank of supervisor and Coordinator 1 and students employed during the school year" (90 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	86
Number of persons who cast ballots	75
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	61
Number of segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	45
Number of ballots marked against applicant	17
Number of ballots segregated and not counted	13

2404-06-R: Service Employees International Union Local 2.on Brewery, General and Professional Workers' Union (Applicant) v. Hurley Corporation (Respondent)

Unit: "all employees of Hurley Corporation employed at Ryerson University located at 44-46 Gerrard St. East, 87 Gerrard St. East, 101 Gerrard St. East, 111 Gerrard St. East, 302 Church St., 325 Church St., 341 Church St., 55/63 Gould St., 80 Gould St., 122 Bond St., 125 Bond St., 285 Victoria St., 297 Victoria St., and 55 Dundas St. West, in the City of Toronto, Ontario, save and except forepersons, and persons above the rank of foreperson" (24 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	37
Number of persons who cast ballots	27
Number of segregated ballots cast by persons whose names appear on voter's list	27
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	26
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

2575-06-R: The Canadian Union of Public Employees (Applicant) v. Paladin Ontario Patient Transfer Inc. c.o.b as Travois Medical Transfer (Respondent)

Unit: "all employees employed by Paladin Ontario Patient Transfer Inc. c.o.b. as Travois Medical Transfer in the Town of Whitby and the City of Peterborough, save and except supervisors and persons above the rank of supervisor" (60 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	63
Number of persons who cast ballots	47
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	47
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	41
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	0

2784-06-R: Canadian Union of Public Employees (Applicant) v. St. John's Rehabilitation Hospital (Respondent) v. CUPE Local 790 (Intervenor)

Unit: "all employees employed by St. John's Rehabilitation Hospital, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, persons above the rank of supervisor, Chief Engineer, office staff, and persons regularly employed for more than twenty-four (24) hours per week" (50 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	49
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2806-06-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. TWD Roads Management Inc. (Respondent)

Unit: "all employees of TWD Roads Management Inc. in the District of Thunder Bay, save and except foremen and those above the rank of foreman, office and sales staff" (102 employees in unit)

Number of names of persons on revised voters' list	146
Number of persons who cast ballots	126
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	108
Number of segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names do not appear on voters' list	5
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	58
Number of ballots marked against applicant	50
Number of ballots segregated and not counted	7

2807-06-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Your Credit Union Limited (Respondent)

Unit: "all employees of Your Credit Union Limited in the City of Ottawa, the County of Storemont, Dundas and Glengarry, and the County of Leeds & Grenville, save and except managers, those above the rank of manager, the secretary to the chief executive officer, trainer and those employees already covered by a collective agreement" (46 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	50
Number of persons who cast ballots	39
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	37
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	30
Number of ballots marked against applicant	
Number of ballots segregated and not counted	2

2835-06-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Sensient Flavors Canada Inc. (Respondent)

Unit: "all employees of Sensient Flavors Canada Inc. in the City of Toronto and the Town of Halton Hills, save and except supervisors, persons above the rank of supervisor, quality control, technical, office, clerical and sales staff" (34 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	34
Number of persons who cast ballots	33
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	32
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	31
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

2879-06-R: Teamsters Local Union No. 879 (Applicant) v. Ontario Lottery and Gaming Corporation c.o.b. as OLG Casino Point Edward (Respondent)

Unit: "all security officers of the Ontario Lottery and Gaming Corporation c.o.b. as OLG Casino Point Edward at 200 Venetian Boulevard, Point Edward, Ontario, save and except supervisors, persons above the rank of supervisor, students employed during the school vacation period, surveillance officers, office and clerical staff" (53 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	61
Number of persons who cast ballots	58
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	53
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	36
Number of ballots marked against applicant	16
Number of ballots segregated and not counted	5

2888-06-R: Canadian Union of Postal Workers (Applicant) v. Omni Facility Services Canada limited (Respondent)

Unit #1: "All employees of Omni Facility Services Canada Corp. engaged in building cleaning and maintenance at 393 Millen Road in Stoney Creek, Ontario, save and except supervisors, persons above the rank of supervisor and office staff and clerical staff." (9 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	1
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2889-06-R: Canadian Union of Postal Workers (Applicant) v. Omni Facility Services Canada Limited (Respondent)

Unit: "all employees of Omni Facility Services Canada Limited engaged in building cleaning and maintenance at 4255 Walker Road in Windsor, Ontario, save and except supervisors, persons above the rank of supervisor and office staff and clerical staff" (8 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2959-06-R: Canadian Union of Postal Workers (Applicant) v. Omni Facility Services Canada Limited (Respondent)

Unit: "all employees of Omni Facility Services Canada Limited engaged in building cleaning and maintenance at 70 Trillium Drive in Kitchener, Ontario, save and except supervisors, persons above the rank of supervisor and office staff and clerical staff" (6 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2972-06-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. E & E Seegmiller Limited (Respondent)

Unit: "all truck drivers employed by E & E Seegmiller Limited engaged in construction projects within the counties of Wellington, Brant, Norfolk and the Regional Municipality of Waterloo in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of Intervenor	0
Number of ballots segregated and not counted	0

2973-06-R: U.F.C.W. Local 333 (Applicant) v. 1406284 Ont. Inc. c.o.b. as Hilton Garden Inn Toronto/Vaughan (Respondent)

Unit: "all employees of 1406284 Ont. Inc. c.o.b. as Hilton Garden Inn Toronto/Vaughan located at 3201 Highway 7 West, Vaughan, Ontario, save and except supervisors persons above the rank of supervisor, executive chef and sous chef, office and clerical staff, front desk employees including night auditors, security staff, and students employed by the hotel during the school vacation." (50 employees in unit)

Number of names of persons on revised voters' list	0
Number of persons who cast ballots	41
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	41
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	40
Number of ballots marked against applicant	0

Number of ballots segregated and not counted	0

2982-06-R: Teamsters Local Union 91 (Applicant) v. Hôpital Général de Hawkesbury and District General Hospital (Respondent)

Unit: "all security guards and officers employed at Hôpital Général de Hawkesbury and District General Hospital working in the Town of Hawkesbury, excluding coordinators, supervisors, and persons above the rank of supervisor" (5 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

3133-06-R: International Union of Operating Engineers, Local 793 (Applicant) v. Canadian Slag Services Inc. (Respondent)

Unit: "all employees of Canadian Slag Services Inc. working in and out of the City of Nanitoke, Ontario, save and except non-working foremen, persons above the rank of non-working foreman, office, clerical and technical staff" (9 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	0
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3151-06-R: Canadian Union of Public Employees (Applicant) v. Kids and Company (Respondent)

Unit: "all employees of Kids and Company in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office and clerical staff and students" (12 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	0
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0

Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	0

3171-06-R: Ontario Public Service Employees Union (Applicant) v. London Health Sciences Centre (LHSC) (Respondent)

Unit: "all technical personnel employed by London Health Sciences Centre (LHSC) in the City of London at the Victoria Campus, (South Street and Westminster), save and except persons regularly employed for more than twenty-four hours per week, Bio-medical Technologists, professional medical staff, Graduate Nursing Staff, Undergraduate Nurses, Graduate Pharmacists, Undergraduate Pharmacists, Graduate Dieticians, Student Dietician, Social Workers, Chief Engineer and Assistant Chief Engineer, Residence Director, Supervisors, Foremen, persons above the rank of Supervisor or Foreman, Office and Clerical Staff, Watchmen, Security Guards, Registered Nursing Assistants, Student Registered Nursing Assistants, Graduate and Undergraduate Speech Therapists, Physiotherapists, Occupational Therapists, Psychologists, Psychometrists, Audiologists, staff with Veterinarian degrees, students engaged in a co-operative program between the Employer and a university or college or high school and persons covered by subsisting collective agreements" (86 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	99
Number of persons who cast ballots	59
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	55
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	
Number of ballots marked in favour of applicant	46
Number of ballots marked against applicant	9
Number of ballots segregated and not counted	4

Applications for Certification Dismissed Without Vote

3735-05-R: Labourers International Union of North America, Local 837 (Applicant) v. ReNu Recycling Inc. (Respondent)

2587-06-R: JMR Employees Association (Applicant) v. JMR Electric Company Ltd. (Respondent)

2751-06-R: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. K. J. Beamish Construction Co. Limited (Respondent)

2995-06-R: The International Union of Painters and Allied Trades, Local Union 1590 (Applicant) v. D & M Glass & Mirror Ltd. (Respondent)

3117-06-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. High Point Environmental Inc. (Respondent)

3222-06-R: Communications Energy and Paperworkers Union Local 105.3 (Applicant) v. Communications, Energy and Paperworkers Union of Canada, Local 324 (Respondent)

Applications for Certification Dismissed Subsequent to Vote

2701-98-R: Labourers' International Union of North America, Local 183 (Applicant) v. K. J. Beamish Construction Services Ltd. (Respondent)

Unit: "all Construction Labourers in the employ of the Responding Party in Ontario in the County of Simcoe and the District Municipality of Muskoka in all sectors of the construction industry save and except the ICI Sector, and save and except non-working foremen and persons above the rank of non-working foreman" (20 employees in unit)

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	15
Number of segregated ballots cast by persons whose names do not appear on voters' list	8

3180-02-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Mondiale Development and or Mondial Development Ltd. and or Amacon and or Amacon Development Group Inc. and or Amacon Construction Ltd. and or Pinnacle international Properties (Bloor) Ltd. (Respondent)

Unit: "all construction labourers and all journeymen and apprentice carpenters in the employ of Mondiale Developments or Mondiale Development Ltd. or Amacon or Amacon Development Group Inc. or Amacon Construction Ltd. or Pinnacle International or Pinnacle International Inc. or Pinnacle International Properties (Bloor) Ltd. in all sectors of the construction industry excluding the industrial, commercial and institutional sector in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0

2778-06-R: Service Employees International Union Local 1.on (Applicant) v. 2052734 Ontario Inc. c.o.b Oak Park LaSalle (Respondent)

Unit: "all employees of Oak Park LaSalle in the Town of LaSalle, in the County of Essex, Ontario, save and except supervisors, persons above the rank of supervisor and office and clerical staff" (39 employees in unit)

Number of names of persons on revised voters' list	43
Number of persons who cast ballots	34
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	34
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	17

Number of ballots marked against applicant	17
Number of ballots segregated and not counted	0

2892-06-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. LTJ Construction & Maintenance Ltd. (Respondent)

Unit: "all employees of LTJ Construction & Maintenance Ltd. in the District of Algoma, save and except supervisors, and persons above the rank of supervisor, and office and sales staff" (24 employees in unit)

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	18
Number of ballots segregated and not counted	0

2896-06-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Blue Line Durham Region Inc.,, Coventry Connections Inc.:, 1298934 Ontario Ltd.:, 352044 Ontario Ltd.; and, Bonnie Sawyer (Respondents)

Unit: "all taxi drivers and taxi owners operating under the Blue Line roof sign licensed to operate in the City of Oshawa, Municipality of Clarington or Town of Ajax in the Regional Municipality of Durham, save and except supervisors, persons above the rank of supervisor, dispatchers, telephone staff, multi-car/multi-plate owners and office and clerical staff" (99 employees in unit)

Number of names of persons on revised voters' list	111
Number of persons who cast ballots	92
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	76
Number of segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	39
Number of ballots marked against applicant	39
Number of ballots segregated and not counted	14

3064-06-R: International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada Local 357 (Applicant) v. KW Performing Arts Association c.o.b. as Theatre & Company (Respondent)

Unit: "all stage employees of the Responding Party in the Regional Municipality of Waterloo, save and except Technical Director and persons above that rank" (3 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	1

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	1

3075-06-R: United Food and Commercial Workers International Union (UFCW Canada) (Applicant) v. J & K Crighton Sales Inc. operating as Canadian Tire (Respondent)

Unit: "all employees of J & K Crighton Sales Inc. operating as Canadian Tire located in the City of Essex, Ontario, save and except Managers and persons above the rank of Manager and Cash Supervisor" (48 employees in unit)

Number of names of persons on revised voters' list	50
Number of persons who cast ballots	49
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	46
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	34
Number of ballots segregated and not counted	3

Applications for Certification Withdrawn

1332-05-R: Labourers' International Union of North America, Local 625 (Applicant) v. 1206720 Ontario Ltd. o/a S.B.T. Construction (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 494, International Union of Painters and Allied Trades, Local 1891 (Intervenors)

3283-05-R: Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Applicant) v. The Corporation of the County of Elgin (Respondent) v. Service Employees International Union Local 1.on (Intervenor)

1383-06-R: Labourers International Union of North America, Local 1059 (Applicant) v. Arnill Construction Limited Seeley & Arnill Construction (Respondent)

1633-06-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dama Construction (Respondent)

2369-06-R: United Food and Commercial Workers International Union (UFCW Canada) (Applicant) v. Northwest Protection Services Ltd. (Respondent)

2592-06-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Durham Interior Carpentry Service Inc. (Respondent)

2798-06-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Diamond Masonry & Contracting Inc. (Respondent)

3201-06-R: Canadian Union of Public Employees (Applicant) v. Amica Mature Lifestyles Inc. (Respondent)

3278-06-R: International Union of Operating Engineers, Local 793 (Applicant) v. Leon's Investments Ltd. o/a Leon's Insulation, a division of Superior Plus Inc. (Respondent)

FIRST AGREEMENT - DIRECTION

2533-06-FC: International Union of Operating Engineers, Local 793 (Applicant) v. BM Metals Services Inc. (Respondent) *(Withdrawn)*

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1400-01-R: Canadian Union of Public Employees, Local 543 (Applicant) v. Corporation of the City of Windsor and Windsor-Essex County Housing Corporation (Respondent) *(Withdrawn)*

0537-02-R: Canadian Union of Skilled Workers (Applicant) v. Hydro One Inc., Hydro One Telecom Inc. and, SCBN Telecommunications Inc. (Respondents) v. Power Workers' Union, CUPE Local 1000, C.L.C. ("PWU") (Intervenor) *(Granted)*

0611-02-R: Labourers' International Union of North America and, Labourers' International Union of North America, Ontario Provincial District Council (Applicants) v. Hydro One Inc., Hydro One Telecom Inc. and, SCBN Telecommunications Inc. (Respondents) *(Granted)*

0043-03-R: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Mondiale Developments and/or Mondiale Development Ltd. and/or Amacon and/or Amacon Development Group Inc. and/or Amacon Construction Ltd. and/or Pinnacle International and/or Pinnacle International Inc. and/or Pinnacle International Properties (Bloor) Ltd. (Respondent) *(Withdrawn)*

0536-03-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Armour Engineered Panels & Stucco Systems Inc. and, Fenmar Wall Systems Inc. (Respondents) *(Withdrawn)*

1614-03-R: Power Workers' Union (Applicant) v. Hydro One Inc., Hydro One Telecom Inc. and SCBN Telecommunications Inc. (Respondents) *(Granted)*

3067-03-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. A.V. Tennant General Contractors Ltd.;, John Rae & Sons General Construction Limited; and, Ravin General Contractors Ltd. (Respondents) *(Granted)*

0670-05-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Hydro One Inc., Hydro One Telecom Inc. and, SCBN Telecommunications Inc. (Respondents) v. Power Workers' Union, CUPE Local 1000, C.L.C. ("PWU") (Intervenor) *(Dismissed)*

1685-05-R: Labourers' International Union of North America, Local 1059 and, International Union of Bricklayers and Allied Craftworkers, Local 5 (Applicants) v. C.A.R.V. Masonry Inc., De Cicco Homes and, Carmelo De Cicco Construction Co. Limited (Respondents) *(Terminated)*

2906-05-R: Power Workers' Union, Canadian Union of Public Employees Local 1000 C.L.C. (Applicant) v. Hydro One Inc., Hydro One Telecom Inc., Barrie Hydro Energy Services Inc., Innisfil Hydro Distribution Systems Limited., Innisfil Energy Services Limited and, SCBN Telecommunications Inc. (Respondents) *(Granted)*

2971-05-R: Labourers' International Union of North America, Ontario Provincial District Council on its own Behalf and on Behalf of its affiliated Local Unions 247, 493, 506, 527, 607, 625, 837, 1036, 1059, 1081 and 1089 (Applicant) v. Belanger Construction (1981) Inc., R.M. Belanger Limited (Respondents) v. International Union of Operating Engineers, Local 793 (Intervenor) *(Endorsed Settlement)*

1550-06-R: International Brotherhood of Electrical Workers, Local 1739 (Applicant) v. Huronia Electric Inc., 2020813 Ontario Inc. c.o.b. as H.E. Electric and, 2087709 Ontario Inc. c.o.b. as Simcoe County Contracting (Respondents) *(Withdrawn)*

2018-06-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Anco Contracting Inc. and, 2057957 Ontario Inc. (Respondents) *(Endorsed Settlement)*

2275-06-R: Sheet Metal Workers' International Association Local 47 (Applicant) v. B.J. Millaire Builders Inc. and, B.J. Millaire & Associates Ltd./B.J. Millaire & Associes Ltee. (Respondents) *(Granted) (Having regard to the agreement of the parties.)*

2555-06-R: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. Patrick Pasquale c.o.b. as Pasquale's Painting Inc. and/or, Patrick Pasquale c.o.b. as West Coast Painting (Respondents) *(Granted)*

2729-06-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. TNT Logistics North America Inc. and, TNT Logistics North America, A Division of TNT Canada Inc. and, TNT Canada Inc. and, TNT Canada ULC (Respondents) *(Withdrawn)*

3108-06-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Oakdale Drywall and Acoustics Ltd. and, Oakdale Drywall and Acoustics Inc. (Respondents) *(Granted) (Having regard to the agreement of the parties.)*

SALE OF A BUSINESS

0537-02-R: Canadian Union of Skilled Workers (Applicant) v. Hydro One Inc., Hydro One Telecom Inc. and, SCBN Telecommunications Inc. (Respondents) v. Power Workers' Union, CUPE Local 1000, C.L.C. ("PWU") (Intervenor) *(Granted)*

0611-02-R: Labourers' International Union of North America and, Labourers' International Union of North America, Ontario Provincial District Council (Applicants) v. Hydro One Inc., Hydro One Telecom Inc. and, SCBN Telecommunications Inc. (Respondents) *(Granted)*

0043-03-R: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Mondiale Developments and/or Mondiale Development Ltd. and/or Amacon and/or Amacon Development Group Inc. and/or Amacon Construction Ltd. and/or Pinnacle International and/or Pinnacle International Inc. and/or Pinnacle International Properties (Bloor) Ltd. (Respondent) *(Withdrawn)*

0536-03-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Armour Engineered Panels & Stucco Systems Inc. and, Fenmar Wall Systems Inc. (Respondents) *(Withdrawn)*

1614-03-R: Power Workers' Union (Applicant) v. Hydro One Inc., Hydro One Telecom Inc. and SCBN Telecommunications Inc. (Respondents) *(Granted)*

3067-03-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. A.V. Tennant General Contractors Ltd.;, John Rae & Sons General Construction Limited; and, Ravin General Contractors Ltd. (Respondents) *(Granted)*

0670-05-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Hydro One Inc., Hydro One Telecom Inc. and, SCBN Telecommunications Inc. (Respondents) v. Power Workers' Union, CUPE Local 1000, C.L.C. ("PWU") (Intervenor) *(Dismissed)*

1685-05-R: Labourers' International Union of North America, Local 1059 and, International Union of Bricklayers and Allied Craftworkers, Local 5 (Applicants) v. C.A.R.V. Masonry Inc., De Cicco Homes and, Carmelo De Cicco Construction Co. Limited (Respondents) *(Terminated)*

2906-05-R: Power Workers' Union, Canadian Union of Public Employees Local 1000 C.L.C. (Applicant) v. Hydro One Inc., Hydro One Telecom Inc., Barrie Hydro Energy Services Inc., Innisfil Hydro Distribution Systems Limited., Innisfil Energy Services Limited and, SCBN Telecommunications Inc. (Respondents) *(Granted)*

2971-05-R: Labourers' International Union of North America, Ontario Provincial District Council on its own Behalf and on Behalf of its affiliated Local Unions 247, 493, 506, 527, 607, 625, 837, 1036, 1059, 1081 and 1089 (Applicant) v. Belanger Construction (1981) Inc., R.M. Belanger Limited (Respondents) v. International Union of Operating Engineers, Local 793 (Intervenor) *(Endorsed Settlement)*

1550-06-R: International Brotherhood of Electrical Workers, Local 1739 (Applicant) v. Huronia Electric Inc., 020813 Ontario Inc. c.o.b. as H.E. Electric and, 2087709 Ontario Inc. c.o.b. as Simcoe County Contracting (Respondents) *(Withdrawn)*

2018-06-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Anco Contracting Inc. and, 2057957 Ontario Inc. (Respondents) *(Endorsed Settlement)*

2275-06-R: Sheet Metal Workers' International Association Local 47 (Applicant) v. B.J. Millaire Builders Inc. and, B.J. Millaire & Associates Ltd. B.J. Millaire & Associes Ltee. (Respondents) *(Granted) (Having regard to the agreement of the parties.)*

2555-06-R: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. Patrick Pasquale c.o.b. as Pasquale's Painting Inc. and/or, Patrick Pasquale c.o.b. as West Coast Painting (Respondents) *(Granted)*

2729-06-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. TNT Logistics North America Inc. and, TNT Logistics North America, A Division of TNT Canada Inc. and, TNT Canada Inc. and, TNT Canada ULC (Respondents) *(Withdrawn)*

3108-06-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Oakdale Drywall and Acoustics Ltd. and, Oakdale Drywall and Acoustics Inc. (Respondents) *(Granted) (Having regard to the agreement of the parties.)*

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1518-06-R: Yang, Mee Ok (Applicant) v. Communications, Energy and Paperworkers Union of Canada, Local 87-M Southern Ontario Newsmedia Guild (Respondent) v. The Korea Times Daily (Intervenor) *(Terminated)*

Unit: "all employees of THE KOREA TIMES Hankookilbo Ltd. in the City of Toronto, save and except supervisors and persons above the rank of supervisor and persons employed in the distribution and accounting departments and in KBC radio." (34 employees in unit)

Number of names of persons on revised voters' list	35
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	30
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0

Number of ballots marked in favour of respondent	15
Number of ballots marked against respondent	15
Number of ballots segregated and not counted	4

2782-06-R: Al McCaig, on his own behalf and on behalf of a group of employees of Adams & Kennedy Company Limited (Applicant) v. The United Brotherhood of Carpenters and Joiners of Ameirca Central Ontario Regional Council, Local 2000 (Respondent) v. Adams & Kennedy Company Limited (Intervenor) *(Dismissed)*

Unit: "all employees of Adams & Kennedy Company Limited at its plant in Ottawa-Carlton, save and except non-working foremen and persons above the rank of non-working foreman, security guards, office and sales staff" (11 employees in unit)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0

2989-06-R: Annette Baker (Applicant) v. Public Service Alliance of Canada Local 000636 (Respondent) v. Koprash Investments Inc. c.o.b. Sunlite Floor Cleaners (Intervenor) *(Dismissed)*

Unit: "all employees of Koprash Investments Inc. c.o.b. Sunlite Floor Cleaners, in the County of Simcoe, save and except inspectors, supervisors and persons above the rank of supervisor" (106 employees in unit)

Number of names of persons on revised voters' list	108
Number of persons who cast ballots	81
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	81
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	42
Number of ballots marked against respondent	39
Number of ballots segregated and not counted	0

3057-06-R: Ewa Kuchta (Applicant) v. United Food and Commercial Workers Canada (UFCW Canada), Local 206 (Respondent) v. Cintas (Intervenor) *(Dismissed)*

Unit: "all employees of the Employer at 6885 Davand Drive in Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, divers, students employed for the school vacation period, and persons regularly employed for not more than twenty (20) hours per week" (37 employees in unit)

Number of names of persons on revised voters' list	36
Number of persons who cast ballots	36
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	35
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1

Number of ballots marked in favour of respondent	23
Number of ballots marked against respondent	12
Number of ballots segregated and not counted	0

3173-06-R: Employees of the Canadian Mental Health Association Victoria County Branch (Applicant) v. Ontario Public Service Employees Union, Local 309 (Respondent) v. Canadian Mental Health Association, Victoria County Branch (Intervenor) *(Terminated)*

Unit: "all employees of the Canadian Mental Health Association, Victoria County in the Town of Lindsay, save and except supervisors, persons above the rank of supervisor, Voluntary Financial Planning Program (VFPP) person, and Administrative Assistant to the Executive Director" (11 employees in unit)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	8
Number of ballots segregated and not counted	0

3228-06-R: Maria Lurdes Barros on behalf of Park Hyatt Toronto Employees (Applicant) v. UNITE HERE Local 75 (Respondent) v. The Park Hyatt Toronto (Intervenor) *(Granted)*

Unit: "all full-time and part-time regular employees of the employer whose classifications are listed in Schedule "C": Service Bartender; Stool Bartender; Composite Bartender; Bar Bus Help; Server; Banquet Wait Staff; Room S. Wait Staff; Mini Bar" (50 employees in unit)

3242-06-R: Curtis Topham (Applicant) v. National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW Canada) (Respondent) v. BI-AX International Inc. (Intervenor) *(Granted)*

3244-06-R: Bobby Sooknanan (Applicant) v. Teamsters Local Union No. 419 (Respondent) v. Columbus Metal Finishing Ltd. (Intervenor) *(Granted)*

3265-06-R: Dryden Electrix Inc. (Applicant) v. The International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario (Respondent) *(Dismissed)*

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2788-98-U: Labourers' International Union of North America, Local 183 (Applicant) v. K. J. Beamish Construction Services Ltd. (Respondent) *(Dismissed)*

3606-01-U: Robert Maxwell (Applicant) v. I.W.A. - Canada, Local 1000 (Respondent) v. Tembec Industries Inc. (Intervenor) *(Withdrawn)*

4164-02-U: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Mondiale Development and/or Mondial Development Ltd. and/or Amacon and/or Amacon Development Group Inc. and/or Amacon Construction Ltd. and/or Pinnacle International and/or Pinnacle International Inc. and/or Pinnacle International Properties (Bloor) Ltd. (Respondent) *(Withdrawn)*

2746-04-U: Ingrid Morales (Applicant) v. Service Employees' International Union, Local 204 (Respondent) *(Withdrawn)*

0789-05-U; 0790-05-U; 0791-05-U: Pat Ronholm (Applicant) v. United Food and Commercial Workers Local 175; Jim Robinson (Applicant) v. United Food and Commercial Workers Local 175; Steve Fisher (Applicant) v. United Food and Commercial Workers Local 175(Respondent) *(Withdrawn)*

1965-05-U: The Public Service Alliance of Canada (Applicant) v. The Town of Moosonee (Respondent) *(Withdrawn)*

1973-05-U: Muthiah Bhavani (Applicant) v. UNITE HERE Ontario Council (Respondent) *(Dismissed)*

2637-05-U: UFCW Canada (Applicant) v. SNS Hotels Restaurant c.o.b. as Brantford Holiday Inn (Respondent) *(Granted)*

3158-05-U: Ontario Public Service Employees Union on behalf of its Local 554 (Applicant) v. REENA (Respondent) *(Withdrawn)*

3413-05-U: Dillon Smith (Applicant) v. Power Workers' Union (Respondent) *(Dismissed)*

3461-05-U: Deb Jenkins (Applicant) v. International Association of Machinists and Aerospace Workers (Respondent) v. GKN Walterscheid Inc. (Intervenor) *(Withdrawn)*

4240-05-U: Laura Longman (Applicant) v. The Power Workers Union, Canadian Union of Power Employees Local 1000 (Respondent) v. Ontario Power Generation (Intervenor) *(Dismissed)*

4250-05-U: Shawn Mann (Applicant) v. Ontario English Catholic Teachers' Association (Respondent) *(Dismissed)*

0023-06-U: R.M. Belanger Limited (Applicant) v. Labourers' International Union of North America, Local 493 (Respondent) *(Withdrawn)*

0169-06-U: Steve Jackman (Applicant) v. United Food and Commercial Workers Canada Local 1000A (Respondent) v. Loblaw Companies Limited (Intervenor) *(Dismissed)*

0171-06-U: BM Metals Services Inc. (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) *(Withdrawn)*

0475-06-U: Naum Naumovski (Applicant) v. Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 264 (Respondent) *(Withdrawn)*

0553-06-U: Olive Fergus (Applicant) v. Canadian Union of Public Employees, Local 79 (Respondent) v. City of Toronto (Intervenor) *(Dismissed)*

0605-06-U: Nadine Eldridge (Applicant) v. Teamsters Local 647 (Respondent) v. Canada Bread Company Limited (Intervenor) *(Dismissed)*

0654-06-U: Labourers' International Union of North America, Local 506 (Applicant) v. AVW-Telav Inc. (Respondent) *(Withdrawn)*

0660-06-U: Carol Klue Helen Leoni (Applicant) v. Canadian Union of Public Employees and its Local 1734 (Respondent) *(Dismissed) (Having regard to the agreement of the parties.)*

1022-06-U: Filmore Allwood (Applicant) v. Power Workers' Union, Canadian Union of Public Employees, Local 1000 (Respondent) v. New Horizon System Solutions (Intervenor) *(Dismissed)*

1150-06-U: Service Employees International Union - Local Lon (Applicant) v. Sodexho MS Canada Limited (Respondent) *(Withdrawn)*

1223-06-U: Ray Kelleher (Applicant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local 647 affiliated with the International Brother of Teamsters (Respondent) *(Terminated)*

1233-06-U: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Sitel Customer Care Inc. (Respondent) *(Withdrawn)*

1307-06-U: Thomas Park (Applicant) v. CAW Local 385 (Respondent) v. Coca-Cola Bottling Company (Intervenor) *(Dismissed)*

1308-06-U: Stennette Johnson (Applicant) v. Canadian Union of Public Employees and its Local 4236 (Respondent) *(Withdrawn)*

1348-06-U: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Grand Valley Building Supplies Co., a division of GVBS Inc. (Respondent) *(Withdrawn)*

1582-06-U: Communications, Energy and Paperworkers Union of Canada, Local 87-M (Applicant) v. The Korea Times Ltd. and/or The Korea Times Daily, Lawrence Kim, and Mee Ok Yang (Respondents) *(Terminated)*

1619-06-U: :Gregory-John: Bloom (Applicant) v. Iron Workers Local 721 (Respondent) *(Dismissed)*

1785-06-U: Tom R. Thomson (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) *(Dismissed)*

1879-06-U: Pauline Henry (Applicant) v. United Food & Commercial Workers, Local 206 (Respondent) v. Compass Group Canada (Beaver) Ltd. (Intervenor) *(Withdrawn)*

2041-06-U: Scott McMillan (Applicant) v. Teamsters' Local Union No. 230, Ready Mix, Building Supply, Hydro and Constructions Drivers, Warehousemen and Helpers (Respondent) *(Dismissed)*

2092-06-U: Susette Schacherl (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Ministry of the Attorney General (Intervenor) *(Dismissed)*

2126-06-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Annan & Bird Lithographers Ltd. (Respondent) *(Withdrawn)*

2304-06-U: The Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario (Respondent) *(Withdrawn)*

2347-06-U: Marc Vachon (Applicant) v. Service Employees International Union AFL-CIO-CLC Local Lon (Respondent) *(Withdrawn)*

2359-06-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Annan & Bird Lithographers Ltd. (Respondent) *(Withdrawn)*

2373-06-U: Mr. Albertino Cardadeiro (Applicant) v. Operative Plasterers', Cement Masons' and Restoration Steeplejacks of the United States and Canada, Local 598 (Respondent) *(Withdrawn)*

2378-06-U: Southwestern Ontario Health Care and Service Workers Union, Local 303 affiliated with Christian Labour Association of Canada (Applicant) v. Millennium Teleservices of Canada, Co. (Respondent) *(Withdrawn)*

2383-06-U; 2384-06-U: Zbignew Sarnecki (Applicant) v. Canadian Auto Workers Union of Canada; Stan Kusmierz (Applicant) v. Canadian Auto Workers Union of Canada (Respondent) *(Dismissed)*

2440-06-U: Patricia Mary Moore (Applicant) v. Elementary Teachers Federation of Ontario and its Local, Lakehead Elementary Teachers of Ontario (Respondent) v. Lakehead Public Schools (Intervenor) *(Dismissed)*

2475-06-U: Canadian Union of Public Employees (Applicant) v. Travois Medical Transfer (Respondent) *(Withdrawn)*

2479-06-U: Ontario Public Service Employees Union (Applicant) v. Ontario Patient Transfer (Respondent) *(Withdrawn)*

2490-06-U: Shawntay Johnson (Applicant) v. Canadian Union of Public Employees, Local 2028 (Respondent) v. Riverside Health Care Centre (Intervenor) *(Withdrawn)*

2572-06-U; 2636-06-U; 2641-06-U: Martha Chungata (Applicant) v. Steelworkers Metallos (Respondent) *(Terminated)*

2598-06-U: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. TNT Logistics North America, a Division of TNT Canada Inc. (Respondent) *(Withdrawn)*

2634-06-U: Wendy T. Fedecky (Applicant) v. Canadian Race Track Workers Union ("CRTU") (Respondent) *(Dismissed)*

2754-06-U: Janett Grierson (Applicant) v. CAW (Respondent) v. Pace Independent Living (Intervenor) *(Dismissed)*

2793-06-U: Maria Sanginaesi (Applicant) v. Steelworkers Metallos (Respondent) *(Terminated)*

2828-06-U: Mary Pellarin a.k.a. Mary Flood (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 240 (Respondent) *(Withdrawn)*

2847-06-U: Kenroy McIntosh (Applicant) v. Graphic Communications International Union International Brotherhood of Teamsters Conference, Local 100-M (Gciu/Ibt Conference, Local 100-M) (Respondent) *(Withdrawn)*

2848-06-U: Pauline Wiseman (Applicant) v. Canadian Union of Postal Workers (Respondent) *(Dismissed)*

2912-06-U: Abdulhamid Hussein (Applicant) v. CAW Canada Local 6056 (Respondent) *(Endorsed Settlement)*

2935-06-U: Brick and Allied Craft Union of Canada (Applicant) v. Diamond Masonry & Contracting Inc.; Tony Aiello and Joe Aiello (Respondent) *(Withdrawn)*

2936-06-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Diamond Masonry & Contracting Inc. (Respondent) *(Withdrawn)*

2987-06-U: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Innvest Hotels GP X Ltd o/a Holiday Inn Select Hotel and Suites Oakville (Respondent) *(Withdrawn)*

3030-06-U: Doug Wells (Applicant) v. Woodbine Entertainment Group (Respondent) *(Dismissed)*

3068-06-U: Teamsters Local Union No. 879 (Applicant) v. Alfa Paper Products Inc. (Respondent) *(Withdrawn)*

3093-06-U: Al Luce et al (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 222 (Respondent) *(Withdrawn)*

3193-06-U: Firoz Ramji (Applicant) v. Labourers' International Union of North America, Local 506 (Respondent) *(Dismissed)*

3214-06-U: International Brotherhood of Electrical Workers, Local Union 105 (Applicant) v. Sean Electric Ltd. (Respondent) *(Endorsed Settlement)*

3227-06-U: Canadian Union of Public Employees (Applicant) v. Kids and Company (Respondent) *(Withdrawn)*

3264-06-U: Ashokkumar Patel (Applicant) v. 1546152 Ontario Inc. o/a Bagel Heaven Inc. and Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 181 (Respondents) *(Dismissed)*

APPLICATION FOR INTERIM ORDER

2611-06-M: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. TNT Logistics North America, a Division of TNT Canada Inc. (Respondent) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Intervenor) *(Withdrawn)*

2986-06-M: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Clayson Steel (1988) Inc. (Respondent) *(Granted)*

TRUSTEESHIP

3623-04-T: Ontario Nurses' Association (Applicant) v. Ontario Nurses' Association ONA Local 097 (Respondent) *(Terminated)*

JURISDICTIONAL DISPUTES

3716-05-JD: Ontario Provincial Council of the International Union of Painters and Allied Trades, International Union of Painters and Allied Trades, Local 1590 (Applicant) v. The Electrical Power Systems Construction Association, Bruce Power LP, Rankin Construction Inc., K.E.W. Steel Fabricators Ltd., The International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Respondents) *(Dismissed)*

0242-06-JD; 0406-06-JD: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Ellis-Don Corporation, United Brotherhood of Carpenters and Joiners, Local 27 (Respondents) *(Withdrawn)*

2916-06-JD: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Labourers' International Union of North America, Local 506 and, Carwell Construction Ltd. (Respondents) *(Withdrawn)*

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2075-06-M: Fairhaven (Applicant) v. Ontario Nurses' Association (Respondent) *(Withdrawn) (Having regard to the agreement of the parties.)*

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

3070-04-OH: Kym Urry (Applicant) v. Transhelp of the Regional Municipality of Peel (Respondent) v. Canadian Union of Public Employees Local 966 Transhelp (Intervenor) *(Dismissed)*

2556-05-OH: Ralph Downing (Applicant) v. Korex Don Valley ULC (Respondent) *(Withdrawn)*

0216-06-OH: John Forrest (Applicant) v. Thomson Metals & Disposal (Respondent) *(Withdrawn)*

0650-06-OH: Craig Jorgensen (Applicant) v. Falconbridge LTD. (Respondent) *(Terminated)*

1874-06-OH: Carroll Brouse (Applicant) v. Ottawa Congress Centre (Respondent) *(Withdrawn)*

2035-06-OH: Lynn Gabrielle Barber (Applicant) v. Perth East Fire Department (Respondent) *(Dismissed)*

2194-06-OH: Dennis Penny (Applicant) v. Canada Fibers Ltd. (Respondent) *(Withdrawn)*

2344-06-OH: William Howard Lauiolette (Applicant) v. Greater Toronto Fire Protection Ltd. (Respondent) *(Terminated) (Having regard to the agreement of the parties.)*

2617-06-OH: Julie C. Charbonneau (Applicant) v. Trebor Building Products Ltd. (Respondent) *(Withdrawn)*

2652-06-OH: Tammy J. McArthur (Applicant) v. Kelly Services (Canada) Limited (Respondent) v. Ferrero Canada (Intervenor) *(Dismissed)*

3126-06-OH: David Cullen (Applicant) v. The Bay - Burlington Mall (Respondent) *(Terminated)*

CONSTRUCTION INDUSTRY GRIEVANCES

0535-03-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Armour Engineered Panels & Stucco Systems Inc. and, Fenmar Wall Systems Inc. (Respondents) *(Withdrawn)*

3489-03-G: Labourers' International Union of North America, Local 506 (Applicant) v. Burling Ranger Company Inc., A Subsidiary of Burling Ranger Company Limited (Respondent) *(Dismissed)*

2516-04-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Guest Tile Inc. (Respondent) *(Dismissed)*

0667-06-G: Iron Workers District Council of Ontario on its own behalf and on behalf of its Locals 700 and Local 721 (Applicant) v. Soqqvvadro Airectors Inc. (Respondent) *(Granted)*

0738-06-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, District Council of Ontario and its Local 721 (Applicant) v. T & F Structures Group Inc. (Respondent) *(Granted)*

1095-06-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Larry's Asphalt Paving Co. Ltd. (Respondent) *(Withdrawn)*

1551-06-G: International Brotherhood of Electrical Workers, Local 1739 (Applicant) v. Huronia Electric Inc., 2020813 Ontario Inc. c.o.b. as H.E. Electric and, 2087709 Ontario Inc. c.o.b. as Simcoe County Contracting (Respondents) *(Withdrawn)*

1660-06-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Louisbourg Pipelines Inc. (Respondent) *(Withdrawn)*

2003-06-G; 2004-06-G; 2262-06-G; 2263-06-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Associated Mechanical Trades Inc. (Respondent) *(Endorsed Settlement)*

2019-06-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 2057957 Ontario Inc. (Respondent) *(Endorsed Settlement)*

2531-06-G: Canadian Union of Skilled Workers (Applicant) v. Strabag Inc. (Respondent) *(Withdrawn) (Having regard to the agreement of the parties.)*

2554-06-G: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. Patrick Pasquale c.o.b. as Pasquale's Painting Inc. and/or, Patrick Pasquale c.o.b. as West Coast Painting (Respondents) *(Withdrawn)*

2631-06-G: Construction Workers Union Local 150 affiliated with the Christian Labour Association of Canada (Applicant) v. DC Corex Construction Inc. (Respondent) *(Granted)*

2718-06-G: The International Union of Painters and Allied Trades, Local 1819, Glaziers (Applicant) v. Royal Castle Design Inc., Royal Castle Technical Glazing Inc., Lary Luces c.o.b. as Royal "CT" Glazing, and Carlos Andrews (Respondents) *(Endorsed Settlement)*

2824-06-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. City of Toronto (Respondent) *(Withdrawn)*

2834-06-G: Labourers' International Union of North America, Local 506 (Applicant) v. Seron Construction Limited (Respondent) *(Granted)*

65-06-G: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Tito Construction Limited (Respondent) *(Terminated) (Having regard to the agreement of the parties.)*

2866-06-G: International Union of Bricklayers and Allied Craftworkers, Local 5 (Applicant) v. Vesuvius Canada Refractories Inc. (Respondent) *(Terminated)*

2943-06-G: Labourers' International Union of North America Local 1089 (Applicant) v. Facca Construction Company Ltd. (Respondent) *(Withdrawn)*

2946-06-G: Labourers' International Union of North America, Local 1089 (Applicant) v. E.C.C.I. Inc. (Respondent) *(Endorsed Settlement) (Having regard to the agreement of the parties.)*

2947-06-G: Labourers' International Union of North America, Local 1089 (Applicant) v. Norm Brandon Limited (Respondent) *(Withdrawn)*

2953-06-G: Labourers' International Union of North America, Local 506 (Applicant) v. Greenspoon Specialty Contracting Ltd. (Respondent) *(Withdrawn)*

2963-06-G: Sheet Metal Workers' International Association, Local 397 (Applicant) v. Lakehead Roofing and Metal Cladding Ltd. (Respondent) *(Withdrawn)*

2964-06-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Yukon Construction Inc. (Respondent) *(Granted)*

2965-06-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Yustin Interiors Ltd. (Respondent) *(Granted)*

2967-06-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. C.F. Concrete & Drain Inc. (Respondent) *(Granted)*

2968-06-G: Carptenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Margold Contractors Ltd. (Respondent) *(Withdrawn)*

2988-06-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Thyssenkrupp Elevators (Canada) Limited (Respondent) *(Withdrawn)*

2993-06-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Mammoet Canada Eastern Ltd. (Respondent) *(Withdrawn)*

2997-06-G: Carpenters' Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Yukon Construction Inc. (Respondent) *(Endorsed Settlement)*

3019-06-G: The International Union of Painters and Allied Trades, Local Union 1795 (Applicant) v. Clegg Glass Limited (Respondent) *(Granted)*

3020-06-G: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local Union 93 (Applicant) v. Construction J.R. Nini Inc. (Respondent) *(Granted)*

3025-06-G: Labourers' International Union of North America, Local 1036 (Applicant) v. Avery Construction Ltd. (Respondent) *(Terminated)*

3026-06-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. 1130194 Ontario Inc. (Respondent) *(Granted)*

3027-06-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Mega Ohms Electric Inc. Allisa Attias c.o.b. as Mega Ohms Electric Inc. 1065944 Ontario Inc. (Respondent) *(Granted)*

3069-06-G: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Yustin Interiors Limited (Respondent) *(Granted)*

3080-06-G: Greater Ontario Regional Council of Carpenters, Drywall & Allied Workers, Local 2041, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sereco Construction Ltee. (Respondent) *(Granted)*

3094-06-G: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Louisbourg Pipelines Inc. , Bannister Pipeline Construction Company Inc. (Respondents) *(Withdrawn)*

3103-06-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Aker Kvaerner Songer Canada Ltd. (Respondent) *(Withdrawn)*

3109-06-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Oakdale Drywall and Acoustics Inc. (Respondent) *(Withdrawn)*

3124-06-G: Labourers' International Union of North America, Local 1059 (Applicant) v. McKay-Cocker Construction Limited (Respondent) *(Terminated)*

3166-06-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. DB Structural Inc. (Respondent) *(Granted)*

3167-06-G: Labourers' International Union of North America, Local 625 (Applicant) v. LaSalle Backhoe Service (Respondent) *(Terminated)*

3180-06-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Con-Ker Construction (Respondent) *(Withdrawn)*

3182-06-G: Labourers' International Union of North America, Local 625 (Applicant) v. Bridge Tite Coating Inc. and, Bridge Tite Waterproofing and Sealing Ltd. (Respondents) *(Endorsed Settlement) (Having regard to the agreement of the parties.)*

3183-06-G: Sheet Metal Workers' International Association, Local 504 (Applicant) v. Panels and Pipes Inc. (Respondent) *(Granted)*

3207-06-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Prostucco Plastering Ltd. (Respondent) *(Endorsed Settlement) (Having regard to the agreement of the parties.)*

3213-06-G: International Brotherhood of Electrical Workers, Local Union 105 (Applicant) v. Scan Electric Ltd. (Respondent) *(Endorsed Settlement)*

3229-06-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Adriano Calinsky Paz c.o.b. as Well Done Welding (Respondent) *(Granted)*

3230-06-G: International Union of Painters and Allied Trades, Local 1891 (Applicant) v. Ararat Wall Systems and Stucco Ltd. (Respondent) *(Granted)*

3251-06-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Ross & Anglin Ltd. (Respondent) *(Withdrawn)*

DESIGNATION BY MINISTER

2155-06-M: United Association of Journeymen and Apprentices of the Plumbing And Pipefitting Industry of the United States And Canada, Mechanical Contractor Association, Ontario, Ministry of Labour (Applicants) v. International Union of Operating Engineers, Local 793, Sheet Metal Workers' International Association, Local 285 (Respondents) *(Dismissed)*

2750-06-M: Ontario Sheet Metal Workers' & Roofers' Conference ("EMPLOYEE BARGAINING AGENCY") (Applicant) v. Ontario Sheet Metal and Air Handling Group ("EMPLOYER BARGAINING AGENCY") (Respondent) *(Withdrawn)*

APPLICATIONS FOR ACCREDITATION

3079-06-R: oronto-Residential Air Handling Group (Applicant) v. Sheet Metal Workers' International Association, Local 285 (Respondent) *(Withdrawn)*

APPEALS - EMPLOYMENT STANDARDS ACT

0022-05-ES: Omer A. El Sayed (Applicant) v. Novaflow Sysiems Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

2858-05-ES: Michael David Watts (Applicant) v. Totomenai Lodge and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3711-05-ES: AGIP Structural Steel (2002) Ltd. (Applicant) v. Robert Kuik and, Director of Employment Standards (Respondents) *(Terminated) (Having regard to the agreement of the parties.)*

4277-05-ES: Steven William Heyden (Applicant) v. Papi's Lounge and Director of Employment Standards (Respondents) *(Terminated)*

0050-06-ES: Casino Rama Services Inc. (Applicant) v. Willis Paul Jr. and Director of Employment Standards (Respondents) *(Granted)*

0353-06-ES: Oliver Bajor (Applicant) v. Arbitrage Research and Trading Ltd. and Director of Employment Standards (Respondents) *(Dismissed)*

0457-06-ES: Wm. Squibb & Daughters Ltd. (Applicant) v. Tacy Prince, Director of Employment Standards (Respondents) *(Terminated)*

0755-06-ES: Jon Whitehead (Applicant) v. Daniela Fiorini, Director of Employment Standards (Respondents) *(Dismissed)*

0822-06-ES: Tony Frigault (Applicant) v. Heath & Sherwood Drilling Inc. and Director of Employment Standards (Respondents) *(Dismissed)*

0860-06-ES: Pharmaceutical Canada Inc. (Applicant) v. Cheryl Tessier and Director of Employment Standards (Respondents) *(Dismissed)*

0933-06-ES: Stephen John Pollock (Applicant) v. Sievenpiper Associates Inc. and Director of Employment Standards (Respondents) *(Withdrawn)*

0986-06-ES: Wioletta Difede (Applicant) v. Milbourne Real Estate Inc., Director of Employment Standards (Respondents) *(Dismissed)*

1009-06-ES: Hollywood North Auto Parts Inc. (Applicant) v. James L. Bailey, Director of Employment Standards (Respondents) *(Granted)*

1246-06-ES: John Duff (Applicant) v. Pollara Inc. and Director of Employment Standards (Respondents) *(Dismissed)*

1254-06-ES: Gabe's Sunoco (Applicant) v. Adam Seguin and Director of Employment Standards (Respondents) *(Granted)*

1329-06-ES: Muminul Haque (Applicant) v. Phebe's Diner Restaurant, Director of Employment Standards (Respondents) *(Granted)*

1332-06-ES: Alishah Nejatie (Applicant) v. 1480354 Ontario Limited o/a Pizza Nova and Director of Employment Standards (Respondents) *(Dismissed)*

1358-06-ES: Ylli (Tom) Mance (Applicant) v. Victoria International College, Director of Employment Standards (Respondents) *(Terminated)*

1470-06-ES: 1487304 Ontario Corporation o/a Loncame International (Applicant) v. Sylvia Sousa and Director of Employment Standards (Respondents) *(Dismissed)*

1488-06-ES: Olena Kuzmenko (Applicant) v. Wizard of Pawz Ltd. and Director of Employment Standards (Respondents) *(Withdrawn)*

1542-06-ES: Randy Cullen (Applicant) v. Gudon Holdings Limited o/a Fazio Auto Service, Director of Employment Standards (Respondents) *(Withdrawn)*

1604-06-ES: Wen-Sha Hotels o/a Comfort Inn (Applicant) v. Stacey Wallace and. Director of Employment Standards (Respondents) *(Granted)*

1648-06-ES: Total Pool & Spa Limited (Applicant) v. Dean Dennison and Director of Employment Standards (Respondents) *(Dismissed)*

1738-06-ES: 2058761 Ontario Ltd o/a Kipling Kar Wash (Applicant) v. Angel Caceres and Director of Employment Standards (Respondents) *(Dismissed)*

1827-06-ES: Dominion Tavern (Stratford) Inc. (Applicant) v. Sylvia Cook and Director of Employment Standards (Respondents) *(Dismissed)*

1852-06-ES: I.M.S. Couriers Ltd. (Applicant) v. Randall Boomsluiter and Director of Employment Standards (Respondents) *(Dismissed)*

2033-06-ES: Hartwick O'Shea & Cartwright Limited (Applicant) v. Tammy Sagaert and Director of Employment Standards (Respondents) *(Granted)*

2227-06-ES: Evert Ortiz (Applicant) v. Union Felt Products and Director of Employment Standards (Respondents) *(Dismissed)*

2241-06-ES: Lotte Deurloo (Applicant) v. Bethesda Community Services and Director of Employment Standards (Respondents) *(Dismissed)*

2244-06-ES: Playtime Daycare Centre (Applicant) v. Sarah Watson, Director of Employment Standards (Respondents) *(Terminated)*

2293-06-ES: Gailand Pyke (Applicant) v. Peterborough Golf & Country Club, Director of Employment Standards (Respondents) *(Dismissed)*

2350-06-ES: Eastern Independent Telecommunications Ltd. (Applicant) v. Jane Burns and Director of Employment Standards (Respondents) *(Withdrawn)*

2503-06-ES: Cora Steglinski (Applicant) v. Minnow Books Inc. and Director of Employment Standards (Respondents) *(Withdrawn)*

2508-06-ES: 2088343 Ontario Limited o/a Carter Group (Applicant) v. Nadia Williams., Mila Milicevic., Lily Tong., Chao Fei., Yue-Hui Li., Qiao Dong Shi and Director of Employment Standards (Respondents) *(Dismissed)*

2601-06-ES: Musharaf Hanif (Applicant) v. King Palace Inc. and Director of Employment Standards (Respondents) *(Withdrawn)*

2635-06-ES: Inside Night Club (Applicant) v. Director of Employment Standards (Respondent) *(Dismissed)*

2686-06-ES: Xiangdong Wei (Applicant) v. Director of Employment Standards (Respondent) *(Dismissed)*

2859-06-ES: Lorenzo Sacco (Applicant) v. Director of Employment Standards (Respondent) *(Dismissed)*

2864-06-ES: Nancy Strapko (Applicant) v. 859530 Ontario Inc. operating as, Jarlette Health Services and Director of Employment Standards (Respondents) *(Dismissed)*

2921-06-ES: Mark Roberts (Applicant) v. Discount Dental Supply Canada Inc. and Director of Employment Standards (Respondents) *(Dismissed)*

3074-06-ES: Mary Nicholls (Applicant) v. Conquest Carpets Corp., and Director of Employment Standards (Respondents) *(Dismissed)*

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

1439-05-HS: Howie O's Playtime Bowl Inc. (Applicant) v. Patricia Sobczuk, Inspector (Respondent) *(Withdrawn)*

2242-05-HS: Selkirk Canada Corporation (Applicant) v. Rhonda Bowlden-Burns and, Joanne Thisdelle, Inspector (Respondents) *(Withdrawn)*

0065-06-HS: Falconbridge Limited (Applicant) v. Dan Beaulieu, Inspector (Respondent) *(Withdrawn)*

0085-06-HS: Active Team Inc. (Applicant) v. Shela Mirza, Inspector (Respondent) *(Withdrawn)*

1650-06-HS: 1409435 Ontario Ltd. (Applicant) v. Raymond Ross, Inspector (Respondent) *(Withdrawn)*

2069-06-HS: Unimin Canada Ltd. (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 5383 and , Peter Hannikainen, Inspector (Respondents) *(Terminated)*

2746-06-HS: Skyjack Inc. c/o Linamar Corporation (Applicant) v. Sue Hutchinson, Inspector (Respondent) *(Granted)*

2971-06-HS: Genor Recycling Services Limited (Applicant) v. Erica Arsenault, Inspector (Respondent) *(Dismissed)*

3304-06-HS: Matthew Barton (Applicant) v. Ethier Sand & Gravel and, Shaun Carter, Inspector (Respondents) *(Dismissed)*

PUBLIC SECTOR LABOUR RELATIONS TRANSITION ACT, 1997

3158-06-PS: Ontario Nurses' Association (Applicant) v. Central Community Care Access Centre York Region Community Care Access Centre North York Community Care Access Centre Simcoe County Community Care Access Centre, Canadian Union of Public Employees, Canadian Office and Professional Employees Union (Respondents) *(Withdrawn)*

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1115-04-U : Dana Horochowski (Applicant) v. Ontario English Catholic Teachers' Association (Respondent) v. The York Catholic District School Board (Intervenor) *(Dismissed)*

2571-05-ES: William Forlippa (Applicant) v. 1291094 Ontario Ltd. o/a AV Car Sales and Service and, Director of Employment Standards (Respondents) *(Granted)*

3172-05-U : Naveena Chandra (Applicant) v. Ontario Secondary School Teachers' Federation, District 12 (OSSTF D12) (Respondent) v. Toronto District School Board (Intervenor) *(Dismissed)*

1743-06-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Via Trade Construction Inc. (Respondent) *(Dismissed)*

PAY EQUITY ACT

1722-06-PE: Tammy Fedoruk (Applicant) v. Thunder Bay Police Association, Thunder Bay Police (Respondents) *(Dismissed)*

2949-06-PE: Belleville Police Service-Belleville Police Services Board (Applicant) v. Belleville Police - Senior Officer's Association (Respondent) *(Granted)*

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